

Title: Pennsylvania Department of Corrections, et al.,
Petitioners
v.
Ronald R. Yeskey

Docketed:

October 10, 1997

Court: United States Court of Appeals for
the Third Circuit

Entry Date

Proceedings and Orders

Entry	Date	Proceedings and Orders
Mar 3 1997		Record filed.
Oct 8 1997		Petition for writ of certiorari filed. (Response due January 26, 1998)
Nov 7 1997		Brief amici curiae of Nevada, et al. filed.
Nov 12 1997		Waiver of right of respondent Ronald R. Yeskey to respond filed.
Nov 19 1997		DISTRIBUTED. December 5, 1997
Dec 3 1997		Response requested. (Due January 5, 1998)
Dec 19 1997		Order extending time to file response to petition until January 26, 1998.
Jan 20 1998		REDISTRIBUTED. January 23, 1998
Jan 23 1998		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 4, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 30, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, April 14, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 28, 1998.
Jan 26 1998		***** Brief of respondent Ronald R. Yeskey (20 Printed Briefs) in opposition filed.
Feb 9 1998		Motion of respondent for leave to proceed further herein in forma pauperis filed.
Feb 11 1998		DISTRIBUTED. February 27, 1998 (Page 4)
Mar 2 1998		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
Mar 3 1998		Brief amicus curiae of Criminal Justice Legal Foundation filed.
Mar 4 1998		Joint appendix filed.
Mar 4 1998		Brief of petitioners Pennsylvania Department of Corrections, et al. filed.
Mar 4 1998		Brief amici curiae of Council of State Governments, et al. filed.
Mar 4 1998		Brief amici curiae of Nevada, et al. filed.
Mar 4 1998		Motion of Republican Caucus of Pennsylvania House of Representatives for leave to file a brief as amicus curiae filed.
Mar 6 1998		Record filed.
Mar 13 1998		Opposition of respondent to motion of Republican Caucus of Pennsylvania House of Representative for leave to file a brief as amicus curiae filed.
Mar 19 1998		Brief amici curiae of ADAPT, et al. filed.
Mar 23 1998		Motion of Republican Caucus of Pennsylvania House of

Entry Date

Proceedings and Orders

Representatives for leave to file a brief as amicus curiae GRANTED.

Mar 27 1998 Brief amici curiae of National Assn. of Protection and Advocacy Systems, et al. filed.

Mar 27 1998 Brief amici curiae of National Advisory Group for Justice, et al. filed.

Mar 30 1998 Brief amicus curiae of United States filed.

Mar 30 1998 LODGING consisting of ten copies of Settlement Agreements of the United States submitted by the Solicitor General

Mar 30 1998 Brief amici curiae of National Prison Project of the ACLU Foundation, et al. filed.

Mar 30 1998 Brief of respondent Ronald Yeskey filed.

Apr 1 1998 CIRCULATED.

Apr 2 1998 Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Apr 14 1998 Reply brief of petitioners Pennsylvania Department of Corrections, et al. filed.

Apr 20 1998 Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 28 1998 ARGUED.

OFFICE OF THE CLERK
IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN;
JEFFREY A. BEARD, Ph.D.; JEFFREY K. DITTY;
DOES NUMBER 1 THROUGH 20 INCLUSIVE,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(*Counsel of Record*)
SYNDI L. GUIDO
Deputy General Counsel
ALISON TAYLOR
SUZANNE N. HUESTON
Assistants General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Telephone: (717) 783-6563
Counsel for Petitioners

Dated: October 8, 1997

QUESTION PRESENTED

Does the Americans with Disabilities Act apply to inmates in state prisons?

LIST OF PARTIES

Respondent, Ronald R. Yeskey, filed this action against the Commonwealth of Pennsylvania, Department of Corrections; Joseph D. Lehman, in his former capacity as Secretary of the Department; Jeffrey A. Beard, in his former capacity as the Superintendent at the State Correctional Institution at Camp Hill; and Jeffrey K. Ditty, in his capacity as Director of the Central Diagnostic and Classification Center at the State Correctional Institution at Camp Hill.

Joseph D. Lehman has been succeeded by Martin F. Horn. The current Superintendent at the State Correctional Institution at Camp Hill is Kenneth Kyler.

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No. _____

IN THE
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OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN;
JEFFREY A. BEARD, Ph.D.; JEFFREY K. DITTY;
DOES NUMBER 1 THROUGH 20 INCLUSIVE,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, which reversed an order of the United States District Court for the Middle District of Pennsylvania dismissing this action pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit is reported at 118 F.3d 168 (3d Cir. 1997) and is reprinted in Appendix 1a. The opinion and order of the United States District Court for the Middle District of Pennsylvania are not reported but are reprinted in Appendix 14a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was filed on July 10, 1997, and this petition for writ of certiorari has been filed within ninety days of that date. This Court has jurisdiction to review the decision of the Third Circuit pursuant to 28 U.S.C. § 1254(1) (1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X

The Fourteenth Amendment to the Constitution of the United States provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Further, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 provides, in pertinent part:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) provides, in pertinent part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency[.]

STATEMENT OF THE CASE

Respondent Ronald R. Yeskey was a Pennsylvania prisoner declared medically ineligible for admission to a motivational boot camp¹ because of his history of hypertension, despite the sentencing judge's recommendation. In December 1994, Yeskey filed suit in district court, alleging that the Pennsylvania Department of Corrections' refusal to place him in the program violated his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Fourteenth Amendment, and the Pennsylvania Constitution.

The United States District Court for the Middle District of Pennsylvania dismissed Yeskey's complaint, holding that the ADA was inapplicable to state prisons and inmates. The Third Circuit Court of Appeals reversed. The court determined that the ADA's all-encompassing language concerning "services, programs, or activities" included "those that take place in prisons" and that its definition of a "public entity" also included a

1. The motivational boot camp is a program to which certain inmates may be assigned by the state Department of Corrections to serve their sentences. The boot camp provides rigorous physical activity, intensive regimentation and discipline, work on public projects and other treatment. Pa. Stat. Ann. tit. 61, § 1123 (West Supp. 1997). Pursuant to statute, placement of inmates in the boot camp is discretionary with the Department of Corrections. *Id.* § 1126. Although an inmate may be identified as eligible for boot camp placement by the sentencing judge, no inmate has a right to such placement. *Id.* § 1126(d). Upon successful completion of the six months incarceration, the inmate is released on parole for intensive supervision as determined by the Pennsylvania Board of Probation and Parole. *Id.* § 1127.

state or local correctional facility or authority. *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997). The court further concluded that because Congress clearly expressed its intention, in the ADA, to abrogate the states' constitutionally-guaranteed immunity, Congress could alter the usual constitutional balance between the states and the federal government. *Id.* at 173.

REASONS FOR GRANTING THE WRIT

The courts of appeals cannot agree on whether Congress ever intended the ADA to apply to management of disabled state prisoners; and if so, whether Congress has the power to dictate how such an essential state function will be handled. The answers to these questions significantly impact on every prison system in this country. Thus, it is essential for the Court to grant certiorari.

This Court has repeatedly emphasized that the federal government must refrain from unnecessary intrusion into state prison affairs and must afford appropriate deference and flexibility to state prison officials. *See Lewis v. Casey*, 116 S. Ct. 2174, 2185 (1996) (if prison administrators are to make the difficult judgments concerning institutional operations, they must be permitted to exercise wide discretion within the bounds of constitutional requirements); *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (federal district courts must "afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (where state penal institutions are involved, federal courts have a further reason for deference to the appropriate authorities).

The Third Circuit has now joined the Seventh and Ninth Circuits in holding that the ADA applies to state prison operations, whereas the Fourth and Tenth Circuits have reached exactly the opposite conclusion. *See Yeskey*, 118 F.3d at 172 (following *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997) and *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996)). *Accord Armstrong v. Wilson*, No. 96-16870, 1997

WL 525521 (9th Cir. Aug. 27, 1997); *Clark v. California*, No. 96-16952, 1997 WL 525518 (9th Cir. Aug. 27, 1997). Contrast *Torcasio v. Murray*, 57 F.3d 1340, 1344-46 (4th Cir. 1995) (ADA's applicability to state prisons is not clearly established), *cert. denied*, 116 S.Ct. 772 (1996) and *White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996) (ADA does not apply to inmates within a prison setting).

In this case, the Third Circuit criticized the reasoning of the Fourth and Tenth Circuits as "seriously flawed." *Yeskey*, 118 F.3d at 172. Just days ago, the Fourth Circuit countered by characterizing the Third Circuit's legal analysis as "interpretive gymnastics." *Amos v. Maryland Dep't of Pub. Safety and Correctional Services*, No. 96-7091, 1997 WL 581652, at *14 (4th Cir. Sept. 22, 1997).

After a painstaking examination of its decision in *Torcasio*, the Fourth Circuit remained steadfastly convinced that the ADA does not apply to prisons and that opinions to the contrary are unconvincing:

Nothing in the opinions of those courts holding to the contrary even begins to refute the careful analysis we undertook in *Torcasio*. In reaching the conclusion that these Acts do not apply, and could not possibly be applied in the context of prison facilities, we are (and we believe that the Supreme Court will ultimately find itself) persuaded in no small measure by the extraordinarily circuitous statutory analyses which those courts reaching the contrary conclusion have undertaken and the considerable extra-interpretive energies that those courts have been forced to expend in order to limit the systemic chaos that would otherwise have followed on their holdings that these statutes apply to the Nation's myriad state prisons.

Id. at *1. Clearly, the circuits sharply disagree on two critical questions: In enacting the ADA, did Congress intend to dictate the states' management of disabled prisoners; and if so, does the Fourteenth Amendment give Congress that power?

A. There is a fundamental disagreement between the circuit courts of appeals about whether Congress intended the ADA to apply to state prisoners.

Title II of the ADA is written in broad, non-specific language. It states, in pertinent part:

[N]o qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1997). Congress has directed that Title II of the ADA be interpreted in a manner consistent with § 504 of the Rehabilitation Act. According to § 504, the definition of program or activity includes all of the operations of a department, agency, or other instrumentality of a state government.

Like the Seventh and Ninth Circuits, the court below held that the broad definition of "programs and activities" includes prison operations. *Yeskey*, 118 F.3d at 170. *Accord Crawford*, 115 F.3d at 483; *Duffy v. Riveland*, 98 F.3d at 455. In contrast, the Fourth Circuit stated that only a superficial reading of the statutes would support that conclusion. *Amos*, 1997 WL 581652, at *8 (quoting *Torcasio*, 57 F.3d at 1344.) However, the language of the ADA does not specifically include or exclude state prisons or prisoners; indeed, the very breadth of the statutory language renders it ambiguous. *Id.* at *18.²

Thus, the Fourth Circuit's refusal to apply the ADA to state prisons was grounded on an ordinary rule of statutory construction: Where Congress intends to alter the federal-state balance, or invade an essential state function, it must do

2. In fact, the ADA's introductory language suggests the exclusion of prisoners and of prisons, rather than their inclusion. The goals regarding disabled individuals are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" so that the disabled can "pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(8) and (9) (1997). Without question, prison is hardly such a free society. *Amos*, 1997 WL 581652, at *15.

so in unmistakable terms. *Id.* at *6; *Torcasio*, 57 F.3d at 1344 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); and *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Where application of a federal statute to a state would upset the normal constitutional balance of federal and state powers, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Amos*, 1997 WL 581652, at *6 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Therefore, the clear statement rule should be applied to any case which implicates "Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *Torcasio*, 57 F.3d at 1345 (citing Justice Souter's dissent in *United States v. Lopez*, 514 U.S. 549, 611 (1995)).

Repeated pronouncements of this Court indisputably demonstrate that the management of state prisons is, indeed, a core state function. It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Indeed, it is elementary that prison maintenance is an essential part of a primary governmental function — the preservation of societal order through enforcement of criminal law. *Torcasio*, 57 F.3d at 1345 (quoting *Procunier v. Martinez*, 416 U.S. 396, 412 (1974)). Principles of comity and federalism apply with special force in the context of correctional facilities. See *Preiser*, 411 U.S. at 492 ("internal problems of state prisons involve issues so peculiarly within state authority and expertise"); *Procunier*, 416 U.S. at 405 ("where state penal institutions are involved, federal courts

have a further reason for deference to appropriate authorities"). Thus, the Fourth Circuit has correctly observed:

That the management of state prisons is to be left to the states, as free as possible of federal interference, is confirmed by a long line of Supreme Court precedent. . . . [A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or to substitute their judgment for that of the trained penological authorities charged with the administration of such facilities.

Torcasio, 57 F.3d at 1345-46 (citing *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989); *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

In this case, the Third Circuit erroneously limited application of the plain statement rule. The court stated:

[The Fourth Circuit's] extension of the clear statement rule was unwarranted. *Will*, *Atascadero*, and *Pennhurst* all involved instances in which there had been no express waiver or abrogation of the state's traditional immunity from suit, either by the state itself (*Pennhurst*), or by Congress (*Will*, *Atascadero*). Here, in contrast, both Section 504 and Title II of the ADA contain an "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several states."

Yeskey, 118 F.3d at 172-73 (citation omitted). The lower court ignored the fact that, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court applied the clear statement rule even though the case did not involve abrogation of the Eleventh Amendment.

With good reason, the Fourth Circuit has strongly criticized the interpretive analyses undertaken by the Third, Seventh, and Ninth Circuits because of the "extraordinary lengths

to which those circuits have gone to acknowledge the chaos that will likely result from their holdings." *Amos*, 1997 WL 581652, at *14. The Fourth Circuit explained:

Specifically, while purporting to adhere to the text of the Rehabilitation Act and the ADA in determining that the statutes apply to state prisons, the Ninth Circuit — when forced to outline the meaning of "reasonable accommodation" and "undue burden" in the state prison context — has created extratextually, out of whole cloth, a statutory standard by engrafting the constitutional standard onto the statute; for their part, the Seventh and Third Circuits have transformed themselves into contortionists attempting to avoid the necessary consequences of their holdings by declining to outline the meaning of "reasonable accommodation" and "undue burden" in the prison context. Unlike the Ninth, Seventh, and Third Circuits, we decline to engage in such interpretive gymnastics.

Id. (internal citations omitted). As the Fourth Circuit pointed out, Congress simply has not spoken through the ADA with anywhere near the clarity and degree of specificity required to conclude that state prisons are subject to the act. *Id.* at *16.

The Third and Fourth Circuits agree that the legislative history of both the ADA and the Rehabilitation Act is silent on the applicability of those statutes to state prisons, but the courts disagree on the meaning of that fact. *Id.* The Third Circuit found this congressional silence to be a tacit approval of its conclusion that the ADA applies to state and local correctional facilities. *Yeskey*, 118 F.3d at 174 n.7. The Fourth Circuit strenuously disagreed because "[i]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Amos*, 1997 WL 581652, at *17 (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).

Finally, the Fourth Circuit justifiably criticized the Third Circuit for deferring to Department of Justice regulations, 28 C.F.R. § 35.101 *et seq.*, as if the court were "interpreting a stat-

ute which has no implications for the balance of power between the Federal Government and the States." *Amos*, 1997 WL 581652, at *21 (citations omitted). Here, the implications for upsetting that balance of power are enormous, and the intrusiveness of the regulations makes this apparent. *Id.*

Deference to administrative regulations is particularly inappropriate in this case because it is not readily apparent that Congress even has the authority to regulate state prisons. *Id.* at *17. See also *Gregory*, 501 U.S. at 464 (noting the constraint on the Court's "ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause," and stating that "application of the plain statement rule thus may avoid a potential constitutional problem").

B. Whether Congress has the power to dictate how states will manage their disabled prisoners presents a fundamental question that must be addressed by this Court.

In this case, the Third Circuit recognized that prison administration is a core state function³ and acknowledged the looming specter of federal-court management of state prisons which will result from application of the ADA. *Yeskey*, 118 F.3d at 174. Nevertheless, the court found the ADA applicable to state prison systems. In doing so, the Third Circuit ignored a basic principle of statutory construction: whenever possible, an act should be interpreted to reach a constitutional result. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). Rather than blindly accepting the notion that Congress can dictate how disabled prisoners will be treated by the states, it is essential to consider the federal government's ability to make such an intrusion, no matter how well-intentioned.

3. Core state functions are protected from federal interference by the Tenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983). The Tenth Amendment provides that powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the states. U.S. CONST. amend. X.

The ADA was ostensibly enacted under section 5 of the Fourteenth Amendment.⁴ Whether Congress can use its enforcement power to dictate a state's management of its disabled prisoner population is very much open to question and should be resolved by this Court. In this instance, Pennsylvania does not contend that the ADA is unconstitutional, only that it cannot be constitutionally applied to state prisoners.

Congress's enforcement power is not unlimited. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). It extends only to "enforc[ing]" the provisions of the Fourteenth Amendment and is "remedial." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997). "The design of the Amendment and the text of section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* As this Court recognized in *Boerne*, it is not easy to discern the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law; however, the distinction exists and must be observed. *Id.*

The Third, Seventh, and Ninth Circuits have erroneously accepted the premise that Congress can pass disability legislation under section 5 of the Fourteenth Amendment. In *Boerne*, this Court recently struck down legislation in which Congress tried to use its section 5 enforcement power to expand the free exercise of religion beyond the scope of this Court's prior interpretation of that constitutional provision. The Court recognized that if Congress could define its own powers by altering the Fourteenth Amendment's meaning, "it

4. Congress also purportedly enacted the ADA pursuant to its power to regulate commerce. See 42 U.S.C. § 12101(b)(4) (1997). However, in *Printz v. United States*, 117 S.Ct. 2365 (1997), this Court held that federal Commerce Clause legislation may not conscript state officers to enforce a federal regulatory program. Application of the ADA to state prisoners would do precisely what *Printz* forbids: it would legislatively compel state officials to devote state resources to manage disabled prisoners in accordance with a federal regulatory scheme. "Such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 117 S.Ct. at 1284.

is difficult to conceive of a principle that would limit congressional power." *Id.* at 2168.

Similarly, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court struck down legislation that would have extended the right to vote in state elections to anyone over the age of eighteen. In doing so, this Court concluded that the provision could not have been authorized under the Fourteenth Amendment because it addressed discrimination against persons who were not members of a protected class.

This Court should now declare that applying the ADA to state prisoners fails for the same reason: Disabled prisoners do not enjoy protected status, and the ADA cannot grant them federally-enforceable rights that exceed the constitution. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985) (for purposes of Fourteenth Amendment analysis, disabled individuals are similar to the aged in their experiences regarding discrimination, and this Court refused to extend special protections to them). *Id.* at 442.

If principles of federalism are to survive at all, this Court must prohibit excessive federal entanglement in the states' operation of their prisons. Congress may not violate other constitutional provisions to enforce those of the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966), and Congress should not be permitted to interpret national constitutional rights in an overly-expansive manner that frustrates this Court's responsibility to honor and safeguard the concept of federalism. Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 52 (1995).

With the exception of the Fourth Circuit, the courts of appeals have failed or refused to consider the serious impact that their decisions have on the concept of federalism. This Court should make clear that the ADA cannot be interpreted to infringe on the states' right to manage their prisons. Consequently, it is imperative for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(Counsel of Record)

SYNDI L. GUIDO
Deputy General Counsel

ALISON TAYLOR
SUZANNE N. HUESTON
Assistants General Counsel

Counsel for Petitioners

333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 787-9356

APPENDIX

Filed July 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7292

RONALD R. YESKEY,
APPELLANT

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF
CORRECTIONS; JOSEPH D. LEHMAN; JEFFREY A.
BEARD, PH.D.; JEFFREY K. DITTY; DOES NUMBER 1
THROUGH 20, INCLUSIVE,

APPELLEES

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-02125)

Argued: January 31, 1997

Before: BECKER, ROTH, *Circuit Judges*, and
BARRY, *District Judge*.*

(Filed July 10, 1997)

L. ABRAHAM SMITH, ESQUIRE
(ARGUED)

P.O. Box 1644
Greensburg, PA 15601

Attorney for Appellant

*Honorable Maryanne Trump Barry, United States District Judge for
the District of New Jersey, sitting by designation.

THOMAS W. CORBETT, JR.
 Attorney General
 R. DOUGLAS SHERMAN (ARGUED)
 Deputy Attorney General
 CALVIN R. KOONS
 Senior Deputy Attorney General
 JOHN G. KNORR, III
 Chief Deputy Attorney General

Office of Attorney General
 15th Floor, Strawberry Square
 Harrisburg, PA 17120

Attorneys for Appellees

OPINION OF THE COURT

BECKER, *Circuit Judge*.

Ronald R. Yeskey is a Pennsylvania prison inmate who was denied admission to the Pennsylvania Department of Correction's Motivational Boot Camp program because of a history of hypertension, despite the recommendation of the sentencing judge that he be placed therein.¹ Yeskey brought suit in the district court under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, alleging that his exclusion from the program violated that enactment.²

The district court dismissed Yeskey's complaint, Fed. R.

1. The Motivational Boot Camp Act, 61 P.S. §1121 *et seq.*, established a "motivational boot camp" to which certain inmates may be assigned by the Department of Corrections to serve their sentences for a period of six months. The boot camp provides rigorous physical activity, intensive regimentation and discipline, work on public projects, and other treatment. *Id.* §1123. Pursuant to statute, placement of inmates in the boot camp is discretionary, and, as such, no inmate has a right to such placement. *Id.* §1126(d). Upon successful completion of the six months incarceration, the inmate is released on parole for intensive supervision as determined by the Pennsylvania Board of Probation and Parole. *Id.* §1127.

2. Yeskey also asserted claims under 42 U.S.C. § 1983 and state law.

Civ. P. 12(b)(6), holding that the ADA is inapplicable to state prisons. The question of the applicability of the ADA to prisons is an important one, especially in view of the increased number of inmates, including many older, hearing-impaired, and HIV-positive inmates, in the nation's jails. *See generally* Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49, 56-63 (1996). For the reasons that follow, we reverse.³

I.

Because this appeal turns on statutory construction, we begin with the text of the relevant statute, or more precisely, statutes. Although Yeskey only invoked the ADA, our discussion necessarily involves Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). Section 504, the first federal statute to provide broad prohibitions against discrimination on the basis of disability, applies only to programs and activities receiving federal financial assistance. Title II of the ADA, the broader statute, enacted in 1990, extends these protections and prohibitions to all state and local government programs and activities, regardless of whether they receive federal financial assistance. Congress has *directed* that Title II of the ADA be interpreted in a manner consistent with Section 504, 42 U.S.C. § 12134(b), 12201(a),⁴ and all the leading cases take up the statutes together, as will we.

The substantive provisions of the statutes are similar. Section 504 provides in pertinent part:

3. By the time this case was listed for submission in this Court, only a short time remained on Yeskey's sentence, and we have unfortunately been unable to dispose of it until now. He may have been released (the parties have not informed us on this point). However, Yeskey's complaint included a claim for damages, and hence the case is not moot. We also note that, since boot camp placement commences contemporaneous with the execution of sentence, it would probably be nigh impossible to test improper exclusion from the boot camp program in federal court before the six month placement expires, likely creating a situation capable of repetition yet evading review, which excuses mootness.

4. *See generally* Robbins, *supra*, at 73-76.

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency[.]

29 U.S.C. § 794(a).

Title II of the ADA provides in pertinent part:

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the Services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The statutory definition of "[p]rogram or activity" in Section 504 indicates that the terms were intended to be all-encompassing. They include "all of the operations of — (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b) (emphasis added). It is hard to imagine how state correctional programs would not fall within this broad definition.

Moreover, a word in a statute "must be given its 'ordinary or natural' meaning," see *Bailey v. United States*, 116 S. Ct. 501, 506 (1995), and the ordinary meanings of "activity" and "program" clearly encompass those that take place in prisons. "Activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of "an organizational unit for performing a specific function." *Webster's Third New International Dictionary* 22 (1986). "Program" is defined as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. Certainly, operating a prison facility falls within the "duties or functions" of local government authorities. Moreover, Title II's definition of a "public entity" clearly encompasses a state or local correctional facility or authority: "any department, agency,

. . . or other instrumentality of a State or States or local government[.]" 42 U.S.C. § 12131(1)(B) (emphasis added).

This conclusion is bolstered by the Department of Justice (DOJ) regulations implementing both Section 504 and Title II of the ADA. These regulations were expressly authorized by Congress, 29 U.S.C. § 794(a); 42 U.S.C. §§ 12134(a), 12206, and, in view of Congress' delegation, the DOJ's regulations should be accorded "controlling weight unless [they are] 'arbitrary, capricious, or manifestly contrary to the statute.'" *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418 (1995). The same is true of the preamble or commentary accompanying the regulations since both are part of the DOJ's official interpretation of the legislation. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994). DOJ interprets both Section 504 and Title II of the ADA to apply to correctional facilities.

The regulations promulgated by DOJ to enforce Section 504 define the kinds of programs and benefits that should be afforded to individuals with disabilities on a nondiscriminatory basis. The regulations define "program" to mean "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, e.g., a police department or department of corrections." 28 C.F.R. § 42.540(h) (1996) (emphasis added). The term "[b]enefit" includes "provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct)." *Id.* § 42.540(j) (emphasis added). The appendix to the regulations, attached to the Final Rule (45 Fed. Reg. 37620, 37630 (1980)), makes clear that services and programs provided by detention and correctional agencies and facilities are covered by Section 504. This coverage is broad, and includes "jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities." *Id.*

The appendix further provides that those facilities designated for use by persons with disabilities are "required to make structural modifications to accommodate detainees or prisoners in wheelchairs." *Id.* The DOJ regulations

applicable to federally conducted programs also make it clear that institutions administered by the Federal Bureau of Prisons are subject to Section 504. See 28 C.F.R. § 39.170(d)(1)(ii) (Section 504 complaint procedure for inmates of federal penal institutions); *id.* pt. 39, Editorial Note, at 675 (Section 504 regulations requiring nondiscrimination in programs or activities of the Department of Justice apply to the Federal Bureau of Prisons); *id.* at 676 (federally conducted program is "anything a Federal agency does").

The regulations promulgated under Title II of the ADA afford similar protections to persons with disabilities who are incarcerated in prisons, or otherwise institutionalized by the state or its instrumentalities, regardless of the public institution's receipt of federal financial assistance. The regulations state that the statute's coverage extends to "all services, programs, and activities provided or made available by public entities." *Id.* § 35.102(a). This broad language is intended to "appl[y] to anything a public entity does." *Id.* pt. 35, app. A, subpt. A at 456. As part of its regulatory obligations under Title II, the DOJ is designated as the agency responsible for coordinating the compliance activities of public entities that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions." *Id.* § 35.190(b)(6). The preamble to the ADA regulations also refers explicitly to prisons, stating that, where an individual with disabilities "is an inmate of a custodial or correctional institution," the entity is required to provide "assistance in toileting, eating, or dressing to [that] individual[]." *Id.* pt. 35, app. A at 468.⁵

5. Moreover, the DOJ Title II Technical Assistance Manual specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the ADA (January 26, 1992), must be designed and constructed so that they are readily accessible to and usable by individuals with disabilities. *Title II Technical Assistance Manual* II-6.0000, II-6.3300(6). The design standards applicable to facilities covered by Section 504 and Title II also include specific provisions relating to correctional facilities. The DOJ Section 504 regulations adopt the Uniform Federal Accessibility Standards (UFAS),

In sum, Section 504 of the Rehabilitation Act, Title II of the ADA, and the specific provisions in the DOJ regulations listing correctional facilities or departments as covered entities confirm that the Rehabilitation Act and the ADA apply to state and locally-operated correctional facilities.

II.

The weight of judicial authority also supports our conclusion that the ADA applies to prison programs. In *Crawford v. Indiana Department of Corrections*, ___ F.3d ___, 1997 WL 289101 (7th Cir. June 2, 1997), the Seventh Circuit held that Title II of the ADA applied to state prisons in the case of a blind, former state prisoner who sought damages resulting from his exclusion from a variety of programs, activities, and facilities at the prison that were routinely available to the prison's population, including educational programs, the library, and the dining hall. *Accord Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996); *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (holding Rehabilitation Act applicable).

Two circuits have questioned the applicability of Section 704 and Title II to prisons. See *Torcasio v. Murray*, 57 F.3d 1340, 1344-46 (4th Cir. 1995) (coverage of prisons by Section 504 and Title II not clearly established in qualified immunity context), *cert. denied*, 116 S. Ct. 772 (1996);

which apply to federal agencies and entities receiving federal financial assistance. 28 C.F.R. § 42.522(b). UFAS lists "jails, prisons, reformatories" and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. subpt. 101-19.6, app. A at 150. Under Title II, covered entities building new or altering existing facilities may follow either UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). 28 C.F.R. § 35.151(c); see *id.* pt. 36, app. A. Amendments to the ADAAG, adopted as an Interim Final Rule, effective December 20, 1994, by the Architectural & Transportation Barriers Compliance Board, include specific accessibility guidelines for "detention and correctional facilities." 59 Fed. Reg. 31676, 31770-72 (1994). The Department of Justice has proposed adoption of the interim final rule. *Id.* at 31808. The ADAAG is not effective until adopted by the DOJ.

White v. State of Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (neither ADA nor Rehabilitation Act applies to prison employment). In our view, these opinions are seriously flawed. The leading case in support of the Commonwealth's position is *Torcasio*, which was followed by the district court here, and so we focus our sights on that case.⁶

The Fourth Circuit in *Torcasio* acknowledged that the broad language prohibiting discrimination on the basis of disability in both statutes "appears all-encompassing," 57 F.3d at 1344. Nevertheless, the *Torcasio* court was reluctant to find either statute applicable to prisons because of the so-called "clear statement" doctrine, as set out in *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989):

if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 . . . (1985); see also, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 . . . (1984).

Because it found the operation of prisons to be a "core state function," 57 F.3d at 1345, and because neither Section 504 nor Title II includes an express statement of its application to correctional facilities, the *Torcasio* court expressed its doubt that Congress had "clearly" intended either statute to apply to state prisons. *Id.* at 1346.

This extension of the clear statement rule was unwarranted. *Will*, *Atascadero*, and *Pennhurst* all involved instances in which there had been no express waiver or abrogation of the state's traditional immunity from suit, either by the state itself (*Pennhurst*), or by Congress (*Will*, *Atascadero*). Here, in contrast, both Section 504 and Title

6. *Torcasio* did not decide whether either Section 504 or Title II of the ADA applies to prisons; rather, it concluded that such coverage was not clearly established at the time of the events at issue, and that the individual defendants in that case therefore were entitled to qualified immunity. In reaching its qualified immunity ruling, however, the *Torcasio* court discussed the reach of the two statutes at length, and expressed its doubt that either applied to prisons.

II of the ADA contain an "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several states." *Pennhurst*, 465 U.S. at 99 (internal quotation marks and citation omitted); see 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act."); *id.* § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of [the ADA].").

To be sure, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 461 (1991) (internal quotation marks and citations omitted). This requirement, however, is a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470. It is not a warrant to disregard clearly expressed congressional intent.

Torcasio's statement that Congress must specifically identify state or local prisons in the statutory text, if it wishes to regulate them, was expressly disavowed by the Supreme Court in *Gregory*. See *id.* at 467 ("This does not mean that the Act must mention judges explicitly."). Congress need only make the scope of a statute "plain." *Id.* And Congress has done that here. Both Section 504 and Title II speak unambiguously of their application to state and local governments and to "any" or "all" of their operations. In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms "any" and "all."

In *Crawford*, *supra*, just as in this case, the state relied on the fact that prison administration was a "core" state function in arguing that the clear statement rule was triggered. Judge Posner responded most forcefully:

Prison administration is indeed a core function of state government, as is education. But the state's concession

that the Americans with Disabilities Act applies to the prison's relations with its employees and visitors, as well as to the public schools, suggests that the clear-statement rule does not carry this particular core function of state government outside the scope of the Act. We doubt, moreover, that Congress could speak much more clearly than it did when it made the Act expressly applicable to all public entities and defined the term "public entity" to include every possible agency of state or local government. Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, *cf. Gregory v. Ashcroft, supra*, 501 U.S. at 461-63; but the mere provision of public services, such as schools and prisons, is not within that inner core.

Crawford, __ F.3d __, 1997 WL 289101, at *4. We agree.

III.

Despite the Commonwealth's contention to the contrary, moreover, *prisoners* (in contrast to *prisons*) are not excluded from coverage because Section 504 and Title II protect only "qualified individual[s] with a disability." That term is defined in Title II to mean:

an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). The terms "eligibility" and "participation" do not, as *Torcasio* stated, see 57 F.3d at 1347, "imply voluntariness" or mandate that an individual seek out or request a service to be covered. To the contrary, the term "eligibility" simply describes those who are "fitted or qualified to be chosen," without regard to their own wishes. See *Webster's Third New International Dictionary, supra* at 736.

Judge Posner addressed a related aspect of the case quite incisively:

It might seem absurd to apply the Americans with Disabilities Act to prisoners. Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off. But . . . there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management.

Crawford, __ F.3d __, 1997 WL 289101, at *5 (citations omitted). We agree here as well.

In sum, in enacting the ADA, Congress "invoke[d] the sweep of [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The "critical areas" in which "discrimination against individuals with disabilities persists" were set forth in the statute, and include "institutionalization." *Id.* § 12101(a)(3).

Thus, if the plain words of a statute are to guide the courts in interpreting it, then both statutes must be held to apply to state and local correctional facilities.⁷ Essentially, the Commonwealth is asking us to amend the statute, something we cannot do.

IV.

The foregoing discussion establishes that the ADA applies to Yeskey's claim. His claim for injunctive relief is, apparently, moot in view of the impending (or actual) completion of his prison term. His claim for damages will turn, presumably, on whether he should (or would) have been admitted to the boot camp. Even with the ADA applicable, Yeskey might not have been admitted for a number of reasons, which will have to be explored on remand.

The Commonwealth has invoked the specter of federal court management of state prisons:

Application of the ADA to internal prison management would place nearly every aspect of prison management into the court's hands for scrutiny simply because an inmate has a disability. See *Pierce v. King*, 918 F. Supp. 932, 941 (E.D.N.C. 1996). For instance, if the ADA applies to routine prison decisions, it is not unfathomable that courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments and to interfere with security procedures.

Brief at 15. Although these considerations do not override our conclusion that the ADA applies to prisons, our holding does not dispose of the controversial and difficult question whether principles of deference to the decisions of prison officials in the context of constitutional law apply to

7. We add that the legislative history does not inveigh against this conclusion. When the ADA was enacted in 1990, the Rehabilitation Act had been law for seventeen years and a number of cases had held it applicable to prisons and prisoners, yet Congress did not amend that Act or alter any language so as to extirpate those interpretations.

statutory rights. See generally *Robbins, supra*, at 94-97.⁸ We are not sure of the answer, and need not address that question now for, at all events, we doubt that it will be germane in this case. We do, however, "flag" it for another day.

The judgment of the district court will be reversed, and the case remanded for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

8. *Turner v. Safley*, 482 U.S. 78 (1987), establishes a four-part "reasonableness" test for judicial deference to prison management decisions in the face of constitutional challenges (usually under the Eighth Amendment). The first requirement is "a valid rational connection" between the regulation and the alleged governmental interest. The second inquiry is whether alternative means exist for inmates to exercise the right under consideration. The third issue is the effect that accommodation of the asserted right will have on security, administrative efficiency, prison staff, and the larger inmate population. The final prong of the test is whether an alternative means exists for prison officials to accomplish their objectives without infringing on inmates' rights. See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (reaffirmed the *Turner* standard with respect to alleged infringement of inmates' First Amendment right to free exercise of religion).

The Ninth Circuit has held that the *Turner* standard applies to statutory rights such as those created by the ADA. In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), the court reversed a lower court's ruling that denial of food-service positions to HIV-positive inmates discriminated against them impermissibly. Reasoning that, where constitutional protections bend, statutory privileges must too, the court deferred to the penological concerns asserted by prison officials. The Eighth Circuit disagrees. See *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995) (*Turner* does not foreclose all heightened judicial review.)

**FILED
HARRISBURG, PA**

APR 9 1996

MARY E. D'ANDREA, CLERK

Per _____
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RONALD R. YESKEY,	:	
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION NO.
	:	1:CV-95-2125
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
et al.,	:	
	:	
Defendants :	:	

MEMORANDUM

I. Introduction and Background.

The plaintiff, Ronald R. Yeskey, an inmate at SCI-Greensburg, Pennsylvania, has filed objections to the report of the magistrate judge which recommended that the defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) be granted. The named defendants are the Pennsylvania Department of Corrections, Joseph D. Lehman, the Department's Commissioner, Jeffrey A. Beard, the Superintendent at SCI-Camp Hill, Pennsylvania, and Jeffrey K. Ditty, the Director of the Central Diagnostic and Classification Center at Camp Hill. (John Doe defendants one through twenty have also been sued.)

The plaintiff filed this action alleging that the refusal to allow him into a prison boot camp program because of high

blood pressure violated his rights under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165; his fourteenth amendment right to equal protection; his eighth amendment right (as guaranteed under the fourteenth amendment) to be free from cruel and unusual punishment; and his right to due process as guaranteed under Article I, § I of the Pennsylvania Constitution. The plaintiff invokes 42 U.S.C. § 1983 in connection with his federal claims. He seeks damages and declaratory and injunctive relief, including an injunction requiring the defendant to release the plaintiff from confinement on the date he would have been released if he had been allowed into the boot camp program.

Because we are dealing with a motion to dismiss, we must accept as true the factual allegations in the complaint and construe any inferences to be drawn from them in the plaintiff's favor. *See Kost v. Kozakiewicz*, 1 F.3d 176 (3d Cir. 1993). With this standard in mind, we set forth the background to this litigation, as the plaintiff alleges it.

In May 1994, the plaintiff was sentenced in state court after a guilty plea to eighteen to thirty-six months imprisonment. (Complaint, ¶ 9). The sentencing court recommended his placement in the state's boot camp program which would have allowed him to be released on parole if he successfully completed the six-month program. (*Id.*, ¶ 10). On July 1, 1994, while the plaintiff was housed at SCI-Camp Hill awaiting classification, he was refused entry into the boot camp program "due to a medical history of hypertension (on medication)." (*Id.*, ¶ 11). He was also refused entry into "any alternative program offering to disabled persons . . . the same benefits as the Motivational Boot Camp Program." (*Id.*, ¶ 12). He then filed suit, setting forth the causes of action noted above.¹

II. Procedural Background.

The defendants moved to dismiss all of the claims. In regard to the ADA, they made two arguments. First, the plaintiff had no right under state law to admission to the program so even if he had not been denied entrance on the basis

1. The case was filed in the Western District of Pennsylvania but was transferred here on motion of the defendants.

of his high blood pressure, the plaintiff cannot establish that he would have been admitted to the program in any event. Second, the ADA does not require accommodation that would destroy the essential nature of a program. Since rigorous physical activity is essential to the boot camp program, plaintiff cannot be accommodated since his hypertension prevents him from being physically active. In regard to the equal protection claim, they argued that the decision to exclude him was a rational one based on his condition. In regard to relief under section 1983, they argued that the Department could not be sued because the eleventh amendment bars suit against the state and because the Department is not a "person" (using the language of the section) who can be sued under it. Finally, in regard to the state constitutional claim, they argued that we should not retain jurisdiction once the federal claims were gone and that, in any event, state law immunized all of the defendants from this claim.

In his report the magistrate judge recommended that the motion be granted. Noting that admission to the boot camp was discretionary with Department officials, he disposed of the ADA claim as follows:

[W]hether or not the plaintiff is a qualified person with a disability pursuant to the ADA is of no moment, since it is well settled that a state prisoner, whether disabled, or not, does not have a protected liberty interest in matters of classification or particular custody status, and none is provided by the ADA or federal law. [citations omitted]. Moreover, an inquiry by this Court into matters of prison administration, such as classification or custody status would necessarily interfere with the administration's right to police its penal system. These administration (sic) determinations have consistently and correctly been left to the prison management's sound discretion.

(magistrate judge's report at pps. 5-6) (brackets added). The magistrate judge then found the equal protection claim deficient by reasoning that: (1) disabled persons are not a class protected by the clause; and (2) the defendants had not intentionally discriminated because they did not refuse him

entrance on the basis of his membership in a disfavored group but because of his high blood pressure. The magistrate judge next concluded that the eighth amendment claim was invalid because the eighth amendment only protects against the unnecessary and wanton infliction of pain and refusal of entry into the program does not satisfy this standard. The magistrate judge did not address the supplemental state constitutional claim.

The plaintiff then filed his objections which concentrate on the substance of his ADA claim. First, the plaintiff contends that the magistrate judge erred in dismissing the ADA claim on the basis that he cannot assert a constitutional right to participation in the boot camp program. Second, he objects that the magistrate judge erred in requiring a constitutional violation for a section 1983 claim because a violation of a federal statute, here the ADA, is all that is necessary.

In opposing the objections, the defendants argue for the first time that there is no ADA claim because the ADA does not apply to state prisons, relying on cases decided after the briefing of the motion to dismiss. They also contend that the section 1983 claim must fail because that claim requires either a federal constitutional or statutory violation and the plaintiff cannot establish either kind of violation here.

III. Discussion.

We will deal first with the defendants' threshold argument that the ADA does not apply to state prisons. The argument is based on *Little v. Lycoming County*, 912 F. Supp. 809 (M.D. Pa. 1996), a case decided by another judge of this court, and *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), cert. denied sub nom. *Torcasio v. Angelone*, ____ U.S. ____, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996). We need only discuss *Torcasio* since *Little* simply adopts its reasoning.

It will be helpful to preface our discussion with the pertinent sections of Title II of the ADA. Section 12132 prohibits discrimination against the disabled and provides as follows:

Subject to the provisions of this subchapter [Title III], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or

be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. S 12132 (brackets added).

Section 12131(l), the definitional section for Title II, defines a "public entity" as follows:

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government;

...

42 U.S.C. § 12131(l)(A) and (B)

In *Torcasio*, the Fourth Circuit stated that section 12131(l) did not cover state prisons. It therefore held on the issue before it, whether Virginia prison officials were entitled to qualified immunity, that the plaintiff prisoner's claim under Title II of the ADA was barred by this defense. In the Fourth Circuit's perception, section 12131(1)'s language, "when viewed in isolation, appears all-encompassing," 57 F.3d at 1344, but was actually too "broad" and "non-specific" to be able to say that it was "clearly establishe[d]" that the ADA applied to state prisons. *Id.* at 1346 (brackets added). Hence, the defendants could not be subjected to liability since qualified immunity protected them against all claims based on a violation of a federal right except those rights that were clearly established. *Id.* at 1343.

Although decided in the context of qualified immunity, *Torcasio* is relevant here because the court essentially reasoned that the ADA does not apply to state prisons. *See Little, supra*, (applying *Torcasio* in dismissing an ADA claim on the merits); *Staples v. Virginia Department of Corrections*, 904 F. Supp. 487, 490 n.1 (Mag. Judge E.D. Va. 1995) (relying on *Torcasio* in dismissing the ADA claim against one defendant and commenting that "with its ruling ... the Fourth Circuit has all but held that, *per se*, the ADA does not apply to state prison facilities").

Despite the plaintiff's citation to other cases that have applied the ADA to state prisons, we have decided to follow *Torcasio* and *Little*. Based on this decision, we need not examine the plaintiff's objections.

We will issue an appropriate order.

/s/ William W. Caldwell

William W. Caldwell

United States District Judge

Date: April 9, 1996

**FILED
HARRISBURG, PA**

APR 9 1996

MARY E. D'ANDREA, CLERK

**Per _____
Deputy Clerk**

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RONALD R. YESKEY, :
Plaintiff :

vs. :

CIVIL ACTION NO.
1:CV-95-2125

COMMONWEALTH OF :
PENNSYLVANIA, :
et al., :

Defendants :

ORDER

AND NOW, this 9th day of April, 1996, upon consideration of the report of the magistrate judge, dated January 23, 1996, and the objections filed, and upon independent review of the record, it is ordered that:

1. The defendants' motion to dismiss is granted.
2. The plaintiff's federal claims are dismissed and his state constitutional claim is dismissed without prejudice to its filing in an appropriate state court.
3. The Clerk of Court shall close this file.

/s/ William W. Caldwell

William W. Caldwell
United States District Judge

**TEXT OF THE CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

**42 U.S.C. § 12132 (1997)
(Title II of the ADA of 1990)**

Section 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

29 U.S.C. § 794 (1997)
(Rehabilitation Act of 1978)

Section 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) **Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees.** No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) **"Program or activity" defined.** For the purposes of this section, the term "program or activity" means all of the operations of—

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 8801]), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) **Small providers; exceptions to existing facilities.** Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection [enacted March 22, 1988].

(d) **Standards applicable to complaints.** The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

14
No. 97-634

Supreme Court, U.S.

F I L E

JAN 26 1998

CLERK

In the Supreme Court OF THE United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EVE H. CERVANTEZ
(No. 164709)
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center,
7th Floor
San Francisco, CA 94111
Telephone: 415/434-1600
Facsimile: 415/399-3041

DONALD SPECTER
(No. 83925)
Counsel of Record
PRISON LAW OFFICE
General Delivery
San Quentin, CA 94964
Telephone: 415/457-9144
Facsimile: 415/457-9151

Attorneys for Respondent Ronald R. Yeskey

Of Counsel:

WARREN E. GEORGE

(No. 53588)

JOHN V. WADSWORTH

(No. 166838)

MCCUTCHEN, DOYLE, BROWN &

ENERSEN, LLP

Three Embarcadero Center

San Francisco, CA 94111-4066

Telephone: 415/393-2000

ELAINE B. FEINGOLD

(No. 99226)

1542 Scenic Avenue

Berkeley, CA 94708

Telephone: 510/848-8125

MICHAEL W. BIEN

(No. 96891)

ROSEN, BIEN & ASARO

155 Montgomery Street

San Francisco, CA 94104

Telephone: 415/433-6830

QUESTION PRESENTED

1. Whether Congress intended the Americans with Disabilities Act, which prohibits any and all state agencies from discriminating against disabled individuals, to apply to state prisons?

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In the Supreme Court
of the
United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

RONALD R. YESKEY,

Respondent.

Respondent Ronald R. Yeskey respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Third Circuit's opinion in *Yeskey v. Pennsylvania Department of Corrections*, reported at 118 F.3d 168 (3d Cir. 1997), and reprinted at Appendix 1a-13a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners fail to set forth the full text of Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131-12165, in either their Petition for Writ of Certiorari or their Appendix, although the full text is relevant to this statutory interpretation question. The following portions are relevant to this Petition:

§12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,

or be subjected to discrimination by any such entity.

§12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§12134. Regulations**(a) In general**

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under sections 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities," and "communications," regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities," and "communications," such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the

Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) **Standards**

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

STATEMENT OF THE CASE

Respondent Ronald R. Yeskey was originally sentenced to serve eighteen (18) to thirty-six (36) months in state prison, but the sentencing court recommended that Yeskey instead be placed in the Motivational Boot Camp Program ("Boot Camp"). Complaint ¶¶9-10.¹ Participants in the Boot Camp, which is designed for youthful, non-violent offenders, are released on parole after just six months. *Id.* ¶10; 61 Pa. Cons. Stat. Ann. §1123. In addition to early release, participants receive the benefits of substance abuse treatment, continuing education, vocational training and prerelease counseling. 61 Pa. Cons. Stat. Ann. §1123.

Despite the sentencing court's recommendation, Petitioner Department of Corrections determined that Respondent was not eligible to participate in the Boot

¹Because Yeskey's case was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint must be taken as true for purposes of this appeal. See *Albright v. Oliver*, 510 U.S. 266, 268, 127 L. Ed. 2d 114, 120 (1994).

Camp. Specifically, Respondent "was medically disapproved for participation in the program due to a medical history of hypertension (on medication)." Complaint ¶11. Despite Respondent's repeated requests, the Department failed to reconsider the decision deeming Respondent ineligible for participation in the Boot Camp, and also failed to establish any alternative program offering to disabled persons the same benefits provided by the Boot Camp. *Id.* ¶12.

Respondent brought this suit under Title II of the Americans with Disabilities Act ("ADA") against Petitioners—the Commonwealth of Pennsylvania Department of Corrections and three Department officials (in both their individual and official capacities).² Complaint ¶¶4-7. He sought both money damages and an injunction "to immediately enjoin Defendants from administering the Motivational Boot Camp Program without complying with Title II of the ADA and the federal regulations promulgated thereunder." *Id.*, Prayer ¶c.

Petitioners filed a Motion to Dismiss, arguing (1) that Respondent had no protected right to a particular custody status, and (2) that Respondent was not an "otherwise qualified individual" because he could not meet the Boot Camp's requirement of "rigorous physical activity."³ A Magistrate Judge recommended dismissal of the Complaint because state prisoners do "not have a protected liberty interest in matters of classification or particular

²Respondent also alleged violations of the United States and Pennsylvania Constitutions, but those allegations are not at issue here.

³Petitioners attached a copy of the Boot Camp's Physical Fitness Manual, and made the unsupported statement that "[c]learly, Yeskey, suffering from a physical condition that prevents his ability to engage in vigorous physical activity, is not an 'otherwise qualified' individual who can meet the boot camp's requirement of 'rigorous physical activity.'" Brief in Support of the Commonwealth Defendants' Motion to Dismiss at 14-15. The district court correctly ignored these unsupported factual allegations, as this was a motion to dismiss, and not one for summary judgment.

custody status" and because "an inquiry by this Court into matters of prison administration . . . would necessarily interfere with the administration's right to police its penal system." Appendix 16a. In responding to Respondent's Objections to the Magistrate Judge's Report and Recommendation, Petitioners for the first time argued that the ADA does not apply to state prison inmates. The District Court adopted this reasoning and, relying on *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 133 L. Ed. 2d 724 (1996), held that the ADA does not apply to state prison inmates. Appendix 17a-19a.

The Third Circuit reversed. Based on the "plain words of [the] statute," as well as the "weight of judicial authority" and the Department of Justice regulations implementing the statute, the Third Circuit held that the ADA applies to state prison inmates. *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170-74 (3d Cir.), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 8, 1997) (No. 97-634).

REASONS FOR DENYING THE WRIT

First, there is no important split in the circuits warranting review by this Court. Petitioners' contention that "the courts of appeals cannot agree on whether Congress ever intended the ADA to apply to management of disabled state prisoners" (Pet. 4), is incorrect. The Third, Seventh, Eighth, Ninth and Eleventh Circuits, as well as district courts in the Second and Sixth Circuits, have all found, based on the plain language of the statutes, that the ADA and/or Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act" or "Section 504") do apply to state prisoners. Only two judges in the Fourth Circuit have squarely held that the ADA is inapplicable to state prisoners; a vigorous dissent agrees with the other circuits that these two judges misapplied and misinterpreted a standard canon of statutory construction, the "clear statement rule."

Furthermore, other matters raised in connection with this argument are not ripe for review. The ADA is one of a long line of anti-discrimination laws generally

applicable to business establishments and state and local governments. Petitioners attempt to characterize Congress's application of these general anti-discrimination statutes to all state agencies, including state prisons, as "excessive federal entanglement in the states' operation of their prisons." Pet. 12. Petitioners cannot demonstrate any such intrusion on the record in this case, however, because Respondent's Complaint was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, without any factual inquiry or decision on the merits regarding Respondent's particular claims. The Third Circuit specifically noted that Respondent's claim turns on "whether he should (or would) have been admitted to the boot camp. Even with the ADA applicable, Yeskey might not have been admitted for a number of reasons, which will have to be explored on remand." *Yeskey*, 118 F.3d at 174. There is thus no factual record by which this Court could determine whether application of the ADA interfered in state prison management.

Second, there is absolutely no support for Petitioners' contention that there is a split in the circuits regarding congressional power to apply the ADA to state prisons. *See* Pet. 4, 10-12. Indeed, Petitioners failed to raise the issue of the constitutionality of the ADA to the Third Circuit, and all circuit courts to consider the issue have determined that the ADA falls squarely within congressional power to enforce the Fourteenth Amendment. Even if this Court grants certiorari to determine whether Congress intended to apply the ADA to prisons, it should decline to consider this novel constitutional question.

I.

THIS COURT'S GUIDANCE IS NOT NECESSARY TO INTERPRET THE PLAIN LANGUAGE OF THE ADA, WHICH CLEARLY APPLIES TO ALL STATE AGENCIES INCLUDING STATE PRISONS.

The plain language of the ADA, and the clear weight of circuit and district court authority, support the

Third Circuit's decision in this case that the ADA applies to state prisons. Only two judges of the Fourth Circuit have directly held to the contrary—and then only over a vigorous dissent. See *Amos v. Maryland Dep't of Pub. Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir.), petition for cert. filed (U.S. Dec. 19, 1997) (No. 97-1113). Moreover, Petitioners' purported fear that application of the ADA to state prisons will cause "chaos" (Pet. 9) raises imaginary difficulties about the application of the ADA in specific circumstances that are not yet ripe for review. There is thus no need for this Court to grant review to interpret the plain meaning of an unambiguous statute.

A. The Clear Weight Of Circuit And District Court Authority Apply The ADA To State Prisons.

Two years prior to passage of the ADA, the Ninth Circuit held that the Rehabilitation Act applies to state prisoners.⁴ *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988). The Eleventh and Eighth Circuits followed suit. *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991); *Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir. 1994) (dicta); see also *Peeler v. Heckler*, 781 F.2d 649, 652-53 (8th Cir. 1986). Recently, the Third, Seventh, and Ninth Circuits have all determined, based on the plain language of the Act, that the ADA applies to state prisoners. *Yeskey*, 118 F.3d at 172; *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997) (Posner, J.); *Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996); *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686). Moreover, in those circuits in which the issue has not yet been decided, district courts

⁴Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a), prohibits discrimination on the basis of disability by programs that receive federal financial assistance. Title II of the ADA extends these protections to all state and local government programs, regardless of whether they receive federal funds. *Yeskey*, 118 F.3d at 170. Title II of the ADA is to be interpreted in a manner consistent with Section 504. 42 U.S.C. §§12134(b), 12201(a).

have consistently applied the ADA to state prison inmates. See *Randolph v. Rodgers*, 980 F. Supp. 1051, 1059-60 (E.D. Mo. 1997); *Herndon v. Johnson*, 970 F. Supp. 703, 708 (E.D. Ark. 1997); *Kaufman v. Carter*, 952 F. Supp. 520, 529 (W.D. Mich. 1996); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1036-38 (S.D.N.Y. 1995).

Contrary to Petitioners' contention, the Tenth Circuit has not squarely held that the ADA does not apply to state prisons, but has instead held only that it does not apply to prisoner employment. See *White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996). As the Ninth Circuit noted in distinguishing *White*, the plaintiffs in the *Armstrong* case sought "a qualitatively different form of relief than the prisoners in those cases sought. These plaintiffs seek basic access to facilities, inclusion in safety plans, and nondiscriminatory treatment in residential placements and prison programs. 'Rights against discrimination are among the few rights that prisoners do not park at the prison gates.'" *Armstrong*, 124 F.3d at 1025 (quoting *Crawford*, 115 F.3d at 486 (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987))).

Thus, it is only two judges of the Fourth Circuit who have directly held that the ADA does not apply to state prisoners. *Amos*, 126 F.3d at 590-91, 607.⁵ Their decision is based on a misapplication and a misinterpretation of a canon of statutory construction, the "clear statement rule," that has not been similarly misapplied by other circuit courts. Contrary to Petitioners' contention, there is thus no "fundamental disagreement between the circuit courts of appeals about whether Congress intended the ADA to apply to state prisoners." See Pet. 6.

⁵See also *Torcasio v. Murray*, 57 F.3d at 1342 (defendant prison officials granted qualified immunity because it was not clearly established that the ADA applied to state prisoners, or that obesity was a covered disability). District courts within the Fourth Circuit have also declined to apply the ADA to state prison inmates.

B. This Court Need Not Grant Certiorari To Interpret The Plain Language Of The Acts.

Other courts have had no trouble discerning that the plain language of the ADA applies to state prisons. There is thus no need for this Court to grant certiorari to interpret the ADA's unambiguous language. The language of the ADA could not be clearer. It applies to "*any State or local government*" and "*any department, agency, . . . or other instrumentality of a State or States or local government.*" 42 U.S.C. §12131(1)(A) (emphasis added). The court below correctly found that this definition "clearly encompasses a state or local correctional facility or authority." *Yeskey*, 118 F.3d at 170. Other courts concur. See *Armstrong*, 124 F.3d at 1024 ("Congress could hardly have spoken 'much more clearly than it did when it made the ADA expressly applicable to all public entities and defined the term 'public entity' to include every possible agency of state or local government'") (quoting *Crawford*, 115 F.3d at 485).⁶ See also *Amos*, 126 F.3d at 612-13. (Murnaghan, J. dissenting). Indeed, even the majority in *Amos* found that Congress intended the ADA to apply to the states generally. *Id.* at 604. That is, congressional intent to alter the usual balance between the States and Federal Government is plain from the language of the Act.

The ADA prohibits state and local governments from discriminating against qualified individuals with disabilities in the provision of "services, programs, or activities of a public entity." 42 U.S.C. §12132. Again, this language is clear, and it clearly does not exclude state prisons. "Program or activity" is specifically defined in the Rehabilitation Act to include "*all of the operations of—(1)(A)*

⁶See also *Randolph*, 980 F. Supp. at 1060 ("broad language of both acts was intended to apply to all parts of state government, including prisons"); *Herndon*, 970 F. Supp. at 706 (plain language of Acts applies to prisons); *Fennell v. Simmons*, 951 F. Supp. 706, 708 (N.D. Ohio 1997) (same); *Kaufman*, 952 F. Supp. at 527-28, 529 (same); *Niece*, 941 F. Supp. at 1506 (same).

a department, agency, . . . or other instrumentality of a State . . . any part of which is extended Federal financial assistance." 29 U.S.C. §794(b) (emphasis added). Title II of the ADA is to be interpreted in a manner consistent with Section 504. 42 U.S.C. §§12134(b), 12201(a). As the Court below correctly noted, this statutory definition of "program or activity" was "intended to be all-encompassing. . . . It is hard to imagine how state correctional programs would not fall within this broad definition." *Yeskey*, 118 F.3d at 170.⁷

Nor is there any support for Petitioners' contention that the ADA's introductory language suggests the exclusion of prisoners because the goals of the ADA are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" so that people with disabilities can "pursue those opportunities for which our free society is justifiably famous." Pet. 6 n.2 (quoting 42 U.S.C. §12101(a)(8), (9)). Indeed, these goals mirror the goals of the Motivational Boot Camp Program, from which Respondent was excluded on the basis of his perceived disability. The Boot Camp Program was created because of the Commonwealth's desire "to salvage the contributions and dedicated work which its displaced citizens may someday offer." Pa. Cons. Stat. Ann. §1122. The statutory objectives of the Motivational Boot Camp are to prepare prisoners to be productive members of free society:

- (1) To protect the health and safety of the Commonwealth by providing a program

⁷The Fourth Circuit ignored this statutory definition and instead relied upon the unsupported premise that the operations of state prisons do "not fall naturally within the ambit" of the statutory terms "program" and "activity." *Amos*, 126 F.3d at 601. But see *Yeskey*, 118 F.3d at 170 ("Activity" means, *inter alia*, 'natural or normal function or operation,' and includes the 'duties or function' of 'an organizational unit for performing a specific function.' *Webster's Third New International Dictionary* 22 (1986). 'Program' is defined as 'a plan of procedure: a schedule or system under which action may be taken toward a desired goal.' *Id.* at 1812. Certainly, operating a prison facility falls within the 'duties or functions' of local government authorities").

which will reduce recidivism and promote characteristics of good citizenship among eligible inmates.

* * * *

(3) To provide discipline and structure to the lives of eligible inmates and to promote these qualities in the postrelease behavior of eligible inmates. (*Id.* §1125(b))

See also *Bonner*, 857 F.2d at 562 (The Rehabilitation Act's "goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives . . .").

Because the ADA is unambiguous, the two Fourth Circuit judges erred in applying the clear statement rule. It is unlikely that this mistake will be repeated by other courts. The clear statement rule is a canon of statutory construction that is only to be applied to ambiguous statutes. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-06 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). "It is not a warrant to disregard clearly expressed congressional intent." *Yeskey*, 118 F.3d at 173. As this Court recently stated in declining to apply the clear statement rule to an unambiguous statute:

Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art., I §1, of the Constitution. (*Salinas v. United States*, —U.S.—, 66 U.S.L.W. 4011, 4013 (Dec. 2, 1997) (No. 96-738) (citations omitted))

Moreover, it is highly improbable that other courts will repeat the *Amos* majority's misinterpretation of the clear statement rule, which is flatly contradicted by this Court's decision in *Gregory*, 501 U.S. 452. There is no support for the *Amos* majority's finding that "a clear statement is required not simply in determining whether a statute applies to the States, but also in determining whether the statute applies in the particular manner claimed." *Amos*, 126 F.3d at 604 (citation omitted). If the two *Amos* judges are correct, then "Congress cannot make the Rehabilitation Act and the ADA [or any other statute] applicable to state prisons or to other areas traditionally reserved to the states unless it separately lists each state agency that the statutes apply to in the statutory text." *Id.* at 614 (Murnaghan, J., dissenting).⁸ The court below recognized that this approach has already been rejected by this Court in *Gregory*, which stated "[t]his does not mean that the Act must mention judges explicitly" in order to include them. *Yeskey*, 118 F.3d at 173 (quoting *Gregory*, 501 U.S. at 467).⁹

In *Gregory*, this Court was called upon to determine if a statutory exception to the Age Discrimination in Employment Act (ADEA) for certain high-ranking officials encompassed state judges. The Court recognized that the ADEA covers all state employees except those specifically exempted, and stated that "[i]n the context of a statute that plainly excludes most important state public officials, [the exception for] 'appointee on the policy-making level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges." 501 U.S. at 467.

⁸Congress deliberately chose not to list specific state agencies in Title II, but instead made the Act applicable to "any" and "all" state agencies. See 42 U.S.C. §12131. Congress understood the difference between specifying "any" or "all" rather than listing only certain covered agencies. Compare 42 U.S.C. §12181(7) (listing twelve types of public accommodation covered by Title III of the ADA).

⁹Contrary to Petitioner's suggestion that the court below ignored this Court's decision in *Gregory* (Pet. 8), the Third Circuit carefully analyzed and correctly applied *Gregory*.

The Court thus held that the breadth of the exception (not the breadth of the statute) rendered the statute ambiguous, such that the plain statement rule had to be applied. "In contrast to the ADEA, which expressly excludes most high-ranking officials from its reach, . . . the ADA and [Rehabilitation Act] apply to 'any' and 'all' state entities and operations without exclusions." *Armstrong*, 124 F.3d at 1024.¹⁰ "In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms 'any' and 'all.'" *Yeskey*, 118 F.3d at 173.

Although Petitioners are correct that the management of state prisons is generally regarded as a core state function, it does not follow that the plain statement rule applies to any federal law of general application that affects prisons. Cf. Pet. 7-8. Cases cited by Petitioners for the proposition that federal courts should defer to the judgment of state prison administrators also demonstrate that federal courts have a duty to intervene to protect state prisoners' federal rights when necessary. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 405-06, 415-18 (1974) (striking down censorship of inmate mail); *Turner v. Safley*, 482 U.S. 78, 85 (1987) (striking down prohibition on inmate marriages).

Because the plain language of the ADA applies to state prisons, there is no need to examine Petitioners' other arguments regarding legislative and regulatory history.¹¹

¹⁰The ADA exempts certain classes of individuals but prison inmates are not excluded. See, e.g., 42 U.S.C. §12210(a) (no protection for current users of illegal drugs); *id.* §12208 (no protection for transvestites). When a statute lists specific exemptions, other exemptions are not to be judicially implied. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

¹¹Contrary to Petitioners' contention, there is no conflict between the Third and Fourth Circuits concerning the meaning of the legislative history of the ADA (Pet. 9), since neither Court rested its holding on this (continued...)

Pet. 9-10. However, the Third Circuit's reliance on Department of Justice regulations is amply supported. Ten years prior to passage of the ADA, the Department of Justice promulgated regulations under Section 504 which specifically apply to prisons. See, e.g., 28 C.F.R. §42.540(h) (1980); 28 C.F.R. §42.540(j) (1980); Exec. Order No. 11,914, 45 Fed. Reg. 37,620, at 37,630 (1980). Congress mandated that the ADA regulations be consistent with the Section 504 regulations. 42 U.S.C. §12134(b); see also S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) (purpose of Title II is to apply Section 504 regulations to state and local governments); H.R. Rep. No. 485, Part II, reprinted in 1990 U.S.C.C.A.N. 267, 366, 473 (same). When Congress voices its approval of a pre-existing administrative interpretation of a statute, that interpretation acquires the force of law. See *United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 574-77 (1977). The Fourth Circuit held only that *Chevron* deference¹² was unavailable, but did not discuss these congressional directives that indicate approval of the existing regulations applying Section 504 to prisons. *Amos*, 126 F.3d at 605-07.

C. This Court Should Not Grant Review To Determine The Method By Which The ADA Should Be Applied To Prisons, As That Issue Is Not Ripe For Review.

It is evident that Petitioners' argument for review, and the majority opinion in *Amos*, are based upon an unproven and untried presumption that application of the ADA to state prisons would cause "chaos." Pet. 8-9 (citing *Amos*, 126 F.3d at 600). This also appears to be the chief

¹¹(...continued)

history, but stated only that the legislative history did not weigh against its holding. *Yeskey*, 118 F.3d at 174 n.7; *Amos*, 126 F.3d at 602.

¹²*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

concern of other states that have requested that the petition be granted. See Brief of Amici Curiae at 2, *Pennsylvania Dep't of Corrections v. Yeskey* (No. 97-634) and *Wilson v. Armstrong and California v. Clark* (No. 97-686) (Nov. 1997) (filed by State of Nevada on behalf of itself and other states). That is, Petitioners ask this Court to ignore the plain language of the ADA because its application might interfere with prison management. As Judge Posner recognized in determining that the ADA and Rehabilitation Act apply to state prisons, "[r]ealistically, the state is asking us to amend the two statutes. Realistically, judges do this, or something like it at times." *Crawford*, 115 F.3d at 484. Judge Posner acknowledged that judges use the clear statement rule "when they have great confidence that the legislature could not have meant what it seemed to say," (*id.* at 485), and sometimes formulate exceptions to statutes "to save the statute from generating absurd consequences." *Id.* Although Judge Posner stated that "it might seem absurd to apply the Americans with Disabilities Act to prisoners," (*id.* at 486), he also pointed out

there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not

exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management. (*Id.* at 486 (citations omitted); accord, *Yeskey*, 118 F.3d at 174)

To the extent that the two-judge decision in *Amos*, and Petitioners' arguments for review here, are based on the imagined difficulties in applying the ADA to state prisons, such alleged difficulties are not yet ripe for review.¹³ The two Fourth Circuit judges unjustifiably criticize the Third and Seventh Circuits for "transform[ing] themselves into contortionists attempting to avoid the necessary consequences of their holdings by declining to outline the meaning of 'reasonable accommodation' and 'undue burden' in the prison context." *Amos*, 126 F.3d at 600. However, that question was not before either court, because both cases arose from dismissals under Federal Rule of Civil Procedure 12(b)(6) on grounds that the ADA does not apply to state prisons. *Yeskey*, 118 F.3d at 169; *Crawford*, 115 F.3d at 483. Thus, there had not been any factual determination on which to decide these issues. Nor has there been such a factual determination in any of the cases presently pending before this Court on petition for writ of certiorari.¹⁴ Thus, the fear of undue interference with state

¹³Nor should the Court grant review because of the amici States' claims that their litigation workloads have increased slightly because of prisoner suits brought under the ADA. The fact that a new law brings additional lawsuits is no reason for eviscerating the law.

¹⁴In *Armstrong* the Ninth Circuit held that the ADA applies to state prisons, but did not consider any particular order or injunction. *Armstrong*, 124 F.3d at 1022-25. In *Amos*, the Fourth Circuit affirmed the
(continued...)

prison administration expressed by the *Amos* judges is both premature and unwarranted,¹⁵ and presents no issue warranting review by this Court at this time.

II.

THERE IS NO SPLIT IN THE CIRCUITS OR OTHER REASON FOR THIS COURT TO CONSIDER WHETHER CONGRESS HAS THE POWER TO APPLY GENERALLY APPLICABLE NON-DISCRIMINATION LAWS TO STATE PRISONS.

As a preliminary matter, Petitioners' second argument for review—that Congress lacks power under the Fourteenth Amendment to apply the ADA to state prisoners—was not raised by Petitioners in their Brief to the Third Circuit, nor considered or decided by that court. Moreover, there is no support for Petitioners' contention that the question of whether Congress can use its enforcement power under the Fourteenth Amendment to apply the ADA to state prisoners "is very much open to question." See Pet. 11. No circuit court has even considered this question. See also *Amos*, 126 F.3d at 603 (noting that appellees there did not argue that Congress lacked the power to apply the ADA to state prisons). Petitioners' last ditch attempt to challenge congressional power to apply the

¹⁴(...continued)

district court's grant of summary judgment. *Amos*, 126 F.3d at 612. In *Clark*, the Ninth Circuit affirmed the district court's decision not to dismiss the State of California based on the Eleventh Amendment. *Clark v. California*, 123 F.3d 1267, 1269, 1271 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686).

¹⁵The ADA does not require state officials to take any action that would "fundamentally alter" the nature of the service, program, or activity or that would create an undue financial or administrative burden. 28 C.F.R. §35.130(b)(7) (1991); 28 C.F.R. §35.150(a)(3) (1993); 28 C.F.R. §35.164 (1991). See also *Onishea v. Hopper*, 126 F.3d 1323, 1336 (11th Cir. 1997) (Rehabilitation Act "mandates judicial consideration of interests particular to the prison system").

ADA to state prisons is wholly unsupported, and should not be considered by this Court.

CONCLUSION

In light of the fact that the Court has already granted certiorari in this case, we urge the Court to make clear that the question presented is restricted to the question of the statutory interpretation of the ADA: Did Congress intend to apply the ADA to state prisons? As argued above, the question of the constitutionality of applying the ADA to state prisons is not properly before this Court.

DATED: January 26, 1998.

Respectfully,

DONALD SPECTER
Counsel of Record
PRISON LAW OFFICE

EVE H. CERVANTEZ
HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation

WARREN E. GEORGE
JOHN V. WADSWORTH
MCCUTCHEN, DOYLE, BROWN &
ENERSEN, LLP

ELAINE B. FEINGOLD

MICHAEL W. BIEN
ROSEN, BIEN & ASARO

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CLERK

In The
Supreme Court of the United States
October Term, 1997

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS,
ET AL., *Petitioners*,

v.

RONALD R. YESKEY, *Respondent*.

PETE WILSON, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents*.

STATE OF CALIFORNIA, et al., *Petitioners*,

v.

DERRICK CLARK, et al., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Third and Ninth Circuits

BRIEF OF *AMICI CURIAE*

STATES OF NEVADA, ALABAMA, ALASKA, ARKANSAS,
COLORADO, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA,
TERRITORY OF GUAM, HAWAII, IDAHO, INDIANA, IOWA,
KANSAS, LOUISIANA, COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS, MICHIGAN, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW
MEXICO, NEW YORK, RHODE ISLAND, SOUTH CAROLINA,
SOUTH DAKOTA, UTAH IN SUPPORT OF PETITIONERS

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada
ANNE B. CATHCART
Counsel of Record
Sr. Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(702) 687-4170

BILL PRYOR
Attorney General
State of Alabama
WINSTON BRYANT
Attorney General
State of Arkansas
M. JANE BRADY
Attorney General
State of Delaware
JOHN M. FERREN
Corporation Counsel
District of Columbia
CHARLES H. TROUTMAN
Acting Attorney General
Territory of Guam
CARLA J. STOVALL
Attorney General
State of Kansas
JEFF MODISSETT
Attorney General
State of Indiana
THOMAS J. MILLER
Attorney General
State of Iowa
ROBERT B. DUNLAP, II
Acting Attorney General
Commonwealth of the
Northern Mariana Islands
JEREMIAH W. NIXON
Attorney General
State of Missouri
DON STENBERG
Attorney General
State of Nebraska
PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire
DENNIS C. VACCO
Attorney General
State of New York
CHARLES M. CONDON
Attorney General
State of South Carolina

BRUCE M. BOTELHO
Attorney General
State of Alaska
GALE A. NORTON
Attorney General
State of Colorado
ROBERT A. BUTTERWORTH
Attorney General
State of Florida
ALAN G. LANCE
Attorney General
State of Idaho
MARGERY S. BRONSTER
Attorney General
State of Hawaii
RICHARD P. IEYOUB
Attorney General
State of Louisiana
FRANK J. KELLEY
Attorney General
State of Michigan
MIKE MOORE
Attorney General
State of Mississippi
JOSEPH P. MAZUREK
Attorney General
State of Montana

PETER VERNIERO
Attorney General
State of New Jersey
TOM UDALL
Attorney General
State of New Mexico
JEFFREY B. PINE
Attorney General
State of Rhode Island
MARK W. BARNETT
Attorney General
State of South Dakota
JAN GRAHAM
Attorney General
State of Utah

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INTEREST OF THE AMICI STATES

Nevada and the other *amici* states submit this brief as *amici curiae* in support of two separate petitions for writs of certiorari: *Commonwealth of Pennsylvania v. Yeskey*, Case No. 97-634; and *Armstrong v. Wilson and Clark v. State of California*, Case No. 97-686. The *amici* states urge the Court to reverse the decisions of the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals, and declare that the Americans with Disabilities Act and the Rehabilitation Act (hereinafter "statutes" or "laws") do not apply to the states' management of their convicted felons.

The *amici* states recognize that the statutes attempt to advance a commendable goal - the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. However, the application of the statutes to state prisons improperly interferes with a unique and long recognized essential state function: the management of its prisons. The lower courts' decisions would allow Congress to intrude upon this core state function merely by enacting a broadly worded law of general applicability. This is contrary to the traditional rule that whenever Congress intends to intrude upon a core function, it must do so with an unmistakable and specific statement within the language of the statute.

This theory of congressional authority, if permitted, will upset the constitutional balance of power between the national and state governments. It will allow Congress *carte blanche* to intrude upon the core state function of prison management without any warning to the affected states, and without any indication or assurance that adequate or deliberate

consideration was given to the compelling interest of the states in administering their prisons. The *amici* states believe this will disturb the essential and delicate balance between the national and state governments.

These statutes cannot be held applicable to state prisons absent an unequivocal expression of congressional intent to impact a core state function. In the complete absence of a clear statement of congressional intent, however, five circuit courts of appeal have come to different conclusions regarding the applicability of the statutes to state prisons, resulting in inconsistent decisions and uncertainty among the states. This split among the circuit courts must be resolved.

The *amici* states share a strong and serious concern for the ability of their prison administrators to manage dangerous and manipulative groups of inmates confined within state prison systems. Inmates are well known for demanding special treatment or costly and inappropriate concessions, for a variety of reasons ostensibly based upon constitutional rights but which more often than not are designed to breach the safe, secure and orderly management of the prison. To permit the intrusion of federal regulators or courts into complex decisions involving the classification, housing, employment, education, transfer, safety and security of inmates will inhibit the policy-based choices of prison officials with potentially disastrous results.

Finally, the fiscal impact of the application of the statutes to state prison systems presents serious concern for state legislatures that are presented with a multitude of demands for the allocation of limited resources. The construction of new prisons, or the renovation of older prisons, are tremendously costly undertakings. Given the special problems posed by inmate populations, flexibility in

the use and management of prison facilities is critical. Limiting the ability of prison administrators to accommodate and control the diverse and constantly fluctuating prison populations within reasonable fiscal constraints can have a strong adverse impact on state budgets.

REASONS FOR GRANTING THE PETITIONS

Petitioners' requests for these writs should be granted for the following reasons. In enacting the statutes, Congress failed to include a clear and unequivocal statement that it intended to interfere with the core state function of prison management. Without such a statement, the language of each statute is ambiguous and they cannot be held to apply to the core state function of state prison systems. However, three of the five circuit courts which have considered this issue have reached the contrary conclusion, holding that the broad language of the statutes does include state prisons. The very fact that the circuit courts are split on the question of the application of these statutes to state prison systems demonstrates this ambiguity, and leaves all states without direction on this question. This Court is requested to provide the states with necessary guidance.

There are compelling public policy reasons behind the requirement that Congress must make its intentions clear in the language of a statute when it intends to impact a core state function. First, placing the language in a proposed statute puts all interested parties on notice that Congress is considering passage of a law that may make substantial changes impacting a specific and vital area of state government. This gives affected groups an opportunity to be heard on the proposed legislation. Second, the opportunity for public debate increases the likelihood that Congress will have given adequate and careful deliberation to various

viewpoints prior to enacting a law which could change the balance between the national and state governments.

In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

United States v. Bass, 404 U.S. 336, 349 (1971). Third, requiring a clear expression of intent avoids costly litigation and contradictory results in courts throughout the country. Finally, it avoids uncertainty by state legislators as to whether they must reconsider the allocation of limited state resources.

The unique and difficult problems of operating state prisons fall squarely within the purview of state government. Prison management is a core state function, and this has been clearly recognized by the Court.

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.

Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). See also *Procunier v. Martinez*, 416 U.S. 396 (1974) (Problems facing state prison systems acknowledged to be difficult and intractable and best left to the expertise of trained prison administrators). The *amici* states share a strong concern that many laws appear to be passed without considering their impact on state prison systems. This underscores the importance that the Court affirm that *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) and *Gregory v.*

Ashcroft, 501 U.S. 452 (1991) require a specific and clear statement in the text of the statute if Congress intends that an act apply to state prison systems.

I.

PRISON MANAGEMENT IS A CORE STATE FUNCTION WHICH CANNOT BE SUBJECT TO THE PROVISIONS OF THE ADA AND THE REHABILITATION ACT BECAUSE EACH LACKS A CLEAR STATEMENT OF CONGRESSIONAL INTENT

This Court has recognized that prison management is a core state function.

It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of these problems.

Preiser, supra; see also, *Procunier supra*, at 412.

One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task.

If the Court accepts the argument that the statutes are applicable to state prisons, it will upset the constitutional balance between federal and state governments, and allow a recognized core state function to be legislated by Congress merely by the enactment of broadly worded statutes. Under the Supremacy Clause, Congress may impose its will upon the states, "so long as it is acting within the powers granted it under the Constitution." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Id.*, at 460, citing *Atascadero*, 473 U.S. 234, 243 (1985). The Court in *Gregory* explained:

[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). . . 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971). *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

The ADA broadly defines "public entity" to be "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or

States or local government." 42 U.S.C.A. § 12132 (West 1995). The Rehabilitation Act contains similar sweeping language to describe government programs or activities. 29 U.S.C. § 794(b). Both the ADA and the Rehabilitation Act prohibit discrimination by public entities against disabled persons. The Rehabilitation Act prohibition is limited to any program or activity of any state or local government entity receiving federal financial assistance.

It is far from clear whether Congress intended for the statutes to apply to prisons. A prison is not ordinarily contemplated as being a "public entity" in the usual sense of the word. A prison does not invite members of the general public on its premises; there is no right of the general public to have access to prison facilities or property. In *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), the court held that "the Federal Bureau of Prisons does not fit the definition of 'programs or activities.'" Similarly, the Fourth Circuit has held that correctional facilities "do not provide 'services,' 'programs' or 'activities' as those terms are ordinarily understood." *Torcasio v. Murray*, 57 F.3d 1340, 1347 (4th Cir. 1995). Prisons do not sponsor programs, services or activities for the general public, and inmates do not have a right to participate in any programs, services or activities which a prison system devises. See *Garza v. Miller*, 688 F.2d 480, 485-486 (7th Cir. 1982) *cert. den.*, 459 U.S. 1150 (1983), no property or liberty interest in prison employment; *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983), no justifiable expectation of inmate to be incarcerated in any particular prison; *McCord v. Maggio*, 910 F.2d 1248, 1250-1251 (5th Cir. 1990), inmate has no right to any particular classification, which is a matter left to the discretion of prison officials; *Meachum v. Fano*, 427 U.S. 215, 224-225 (1976).

Prison services, programs and activities are not available to all inmates for many reasons, as they were not designed for the general benefit of inmates but rather to enhance public safety, to reduce recidivism, to protect prison guards, to reduce costs, to occupy inmate time, to segregate inmates into manageable and orderly groups, and to encourage inmates to earn money to pay back the state for costs associated with incarceration. Prison officials must be free to deny inmates access to all manner of programs and activities for countless reasons involving safety, security, and the cost-effective and orderly operation of prison systems.

The legislative history for both statutes contains no specific indication that Congress even considered whether prison systems should be subject to their provisions. One portion of legislative history which makes a statement regarding the desired effect of the ADA is the following excerpt from S.Rep. No. 116, 20; H.R.Rep. No. 485 (II):

There is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

In a prison environment, an administrator's primary concern is not the integration of all inmates into the prison's economic and social mainstream. This is simply not a viable or even desirable goal given the types of individuals who comprise prison populations and the fact that many will never be released into society. Safety and security are the

immediate and paramount concerns of prison administrators, who must be able to make such decisions without being concerned the decision will be deemed discriminatory because the inmate had a disability. A prison administrator must be able to make decisions necessary to protect any inmate, even if that means exclusion of an inmate due to a disability.

Under the Eighth Amendment standard traditionally applied in the prison context, inmates have no right to participate in any programs, services or activities in a prison system, except that their basic human needs must be met. But even these can be provided in different ways depending upon the security concerns present. For example, an inmate need not be permitted access to a cafeteria or law library in order to receive food or legal materials. There simply are too many variables to consider in determining whether a particular inmate should be a participant in a specific program or activity.

Under the ADA,

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132 (West 1995). A qualified individual with a disability is a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." 42 U.S.C.A. § 12131(2) (West 1995). Inmates do not "qualify" for services, programs or activities simply by being incarcerated. To assert that being a convicted felon qualifies a person to access to all facilities and functions in a prison system regardless of safety,

security or other legitimate penological concerns completely distorts any common sense or logical interpretation of these statutes. Even inmates who are otherwise eligible to be considered for participation in programs or activities are denied placement for many reasons, such as the existence of an enemy situation, lack of space, disciplinary record, risk of violence, nature of crime committed, remoteness of medical facility, etc. Compelling the complete accommodation of all disabled inmates regardless of other considerations significantly chills the ability of prison staff to keep safety and security the overriding concern in reaching difficult decisions regarding prisoner assignments.

Prisoners are distinguishable from nonprisoners in that they are serving time for having committed a crime. While recognizing they do not forfeit all of their constitutional rights, many of their rights are diminished by the fact of imprisonment, or necessarily limited in the interest of safety to the general public and to the prison population.

The Act [ADA] was not designed to deal specifically with the prison environment. It was intended for general societal application. There is no indication that Congress intended the act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994).

The very fact that Congress was silent in both the legislative histories and in the language of the statutes as to whether they were intended to encompass the operations of state prisons, allows only one conclusion: the laws cannot be applied to state prisons. In the absence of a clear and deliberate expression of Congress' intent to alter the balance between the states and the federal government where a core

state function is implicated, then the statutes cannot be applied to state prisons.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches.

City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997). The operation of state prison systems is a core state function of paramount concern to every state. The states must retain their states' ability to manage their prisons without federal micromanagement. Absent a clear statement in the statute evidencing an intent by Congress to intrude upon state prison operations, the ADA and the Rehabilitation Act cannot be held to apply to state prisons.

II.

APPLICATION OF THE STATUTES TO STATE PRISONS OPENS A PANDORA'S BOX OF LITIGATION OPPORTUNITIES AND IMPOSES IMMENSE COSTS

By recognizing that prison management is a core state function in *Preiser*, the Court also recognized the institutional need for inmate and staff safety, and the deference that must be given to prison officials.

Absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prison or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities.

Taylor v. Freeman, 34 F.3d 266, 268 (4th Cir. 1994) (citing *Turner v. Safley*, 482 U.S. 78, 84-89 (1987)).

"The need to maintain internal order, discipline and security differentiates prisons from outside society." *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979). The propensity of inmates for violence and dangerousness is presumed to be greater than that of nonprisoners. The desirability of a particular inmate's participation in various programs and activities is dependent on many factors. The management and infrastructure of state prisons have been developed to deal with the unique nature of imprisonment and the multiple problems that arise daily in managing inmates. "Prisons are dangerous places." *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991). If the violent criminals housed in prison are not properly monitored and segregated, the weaker or disabled inmates may become the prey of the more violent or manipulative inmates. This risk of violence is pervasive in prison, and prison officials have a duty under the Eighth and Fourteenth Amendments to provide protection to prisoners who are reasonably in danger of being victimized by their fellow inmates.

If Congress is allowed to legislate the management of state prisons under these statutes, states will be compelled to divert substantial resources in restructuring prison facilities and in defending actions brought under this legislation. "Application of the ADA and Rehabilitation Act would have serious implications for the management of state prisons, in matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security procedures." *Torcasio*, 57 F.3d at 1345. See also *Amos v. Maryland Dept. of Public Safety and Correctional Services*, 1997 WL 581652 (4th Cir. Md.)

Each of the Circuits holding that the Rehabilitation Act and the ADA apply to state prisons has gone to extraordinary lengths to acknowledge the chaos likely to result from their holdings.

Besides the responsibility of modifying prison facilities, extensive time and resources would be required to handle the additional litigation.

Prisoners are not a favored group in society; the propensity of some of them to sue at a drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners right of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off.

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997) citing *Bryant v. Madigan*, 84 F.3d 246, 249 (C.A. 7 (Ill.) 1996).

Inmates filing lawsuits under ADA and Rehabilitation Act theories have lost no time in demonstrating their ability to assert rights to all manner of privileges by claiming various disabilities. (Inmate confined to infirmary claimed entitlement to personal cable TV, *Aswegan v. Bruhl*, 113 F.3d 109 (8th Cir. 1997); One-armed inmate claims he was removed from law library job due to his disability, *Gilkey v. Robson*, Case No. 95-2060, pending in U.S. District Court for the Northern District of Illinois; Inmate claiming to be disabled (medical status disputed) claims he should be exempt from having to wear restraints, *St. Pierre v. McDaniel*, Case

No. CV-N-94-792-ECR, pending in U.S. District Court for the District of Nevada; Inmate demands more law library time because it takes him longer to complete tasks due to mobility limitations, *Crayton v. Mayes*, Case No. CV-F-96-5842, pending in the U.S. District Court for the Eastern District of California; Inmate and wife, HIV positive, demanded conjugal visit, *Bullock v. Gomez*, Case No. CV-95-6634, U.S. District Court of California; Inmates claimed Dept. of Corrections' refusal to provide free nicotine patches violated ADA (Minnesota); Inmate claims he was denied trustee position due to HIV status, *Dean v. Knowles*, 912 F.Supp. 519 (U.S. D.C. for Southern District of Florida, 1976); Inmate complains that ADA inmates with special diets have to eat last, *Halpin v. Mathews*, Case No. GC-G 94-1935, pending in U.S. District Court for Middle District of Florida; Inmate claims that as a totally disabled vet, his costs of supervision and restitution should be paid by the state, *Jaap v. Olsen*, Case No. 93-14177, U.S. District Court for Southern District of Florida; States also report a substantial percentage of cases from inmates demanding that all facilities and programs be modified to accommodate inmates with disabilities as defined in the statutes.

The ADA and the Rehabilitation Act are emerging as the new inmate civil rights litigation frontier. The *amici* states are experiencing increasing workloads related to inmate claims involving these statutes. States have reported significant numbers of cases involving such claims (e.g., current cases include 38 in California; 8 in Florida; 5 in Nevada; 6 in Iowa; 6 in Pennsylvania; 8 in Indiana). Not only do these lawsuits divert state resources, but they shift the burden in litigation. The inmate need only allege he possesses some sort of disability; prison officials must demonstrate they cannot make a reasonable accommodation. Considering the broad definition of "disability" under the ADA (28 CFR Ch. 1, (35.104 Definitions) which appears to

include a wide range of physical or mental impairment, virtually any inmate can claim he had some disability requiring accommodation into all prison services, activities and programs. Such a heavy requirement would eviscerate the existing Eighth Amendment standard which has historically been applied to the prison setting, replacing it with a standard which is, as a practical matter, unworkable in the prison context. The ADA and the Rehabilitation Act effectively provide greater rights to disabled prisoners than to non-disabled prisoners. The fiscal impact to the states of accommodating these demands is of a magnitude which most will be unable to absorb without a severe impact upon other essential state operations.

Of particular concern to the *amici* states is that the application of these statutes to prisons will erode the flexibility that prison administrators need in managing difficult and volatile prison populations. As foreseen by the Seventh Circuit in *Crawford*, the result may be the curtailment of programs for all prisoners. This is what occurred following the enactment of the Religious Freedom Restoration Act in 1993 and prior to this Court's decision in *City of Boerne v. Flores*. A number of state departments of corrections were forced to limit their religious programs due to the impact of inmate demands and litigation. The dramatic increase in prisoner demands for religious accommodation and ensuing lawsuits severely curtailed the ability of prison officials to provide religious services to inmates.

There is no question that Congress was well-intended in enacting these statutes to ensure that disabled persons in the mainstream of American society have reasonable access to public programs, activities and services. However, as to prison systems, in which decisions are not made according to what would be normal or desirable in the real world and can

have life or death consequences, application of these statutes is a serious encroachment upon a core state function.

CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

FRANKIE SUE DEL PAPA
ATTORNEY GENERAL OF NEVADA

ANNE B. CATHCART
Counsel of Record
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3541

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15

Supreme Court, U.S.
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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

JOINT APPENDIX

PAUL A. TUFANO*
General Counsel
Commonwealth of Pennsylvania

SYNDI L. GUIDO
Deputy General Counsel

Office of General Counsel
333 Market Street
17th Floor
Harrisburg, PA 17101
Telephone (717) 783-6563
Counsel for Petitioners

DONALD SPECTER*
Prison Law Office
General Delivery
San Quentin, CA 94964
Telephone (415) 457-9144

EVE H. CERVANTEZ
Howard, Rice, Nemerovski
Canady, Falk & Rabkin
3 Embarcadero Center,
7th Floor
San Francisco, CA 94111
Telephone (415) 434-1600
Counsel for Respondent

**Counsel of Record*

PETITION FOR CERTIORARI FILED OCTOBER 8, 1997
CERTIORARI GRANTED JANUARY 23, 1998

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	<i>The United States District Court for the Western District of Pennsylvania</i>
12/21/94	Complaint
4/24/95	Motion to Dismiss, or, in the Alternative, Motion to Transfer
5/25/95	Petitioner's Brief in Support of the Motion to Dismiss
6/8/95	Petitioner's Supplement to the Motion to Dismiss
6/20/95	Respondent's Brief in Response to the Motion to Dismiss
10/19/95	Report and Recommendation of the Magistrate Judge
11/9/95	Memorandum Order
12/13/95	Case Transferred to the Middle District Court of Pennsylvania
	<i>The United States District Court for the Middle District of Pennsylvania</i>
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2/8/96	Respondent's Brief in Support of Objections
2/13/96	Petitioner's Brief in Opposition to Objections
4/9/96	Memorandum and Order Granting Motion to Dismiss
5/7/96	Notice of Appeal

JA-2

The Court of Appeals for the Third Circuit

7/1/96

Respondent's Brief

8/1/96

Petitioner's Brief

7/10/97

Opinion

7/10/97

Judgment

*The United States District Court for the Middle
District of Pennsylvania*

9/30/97

Petitioner's Motion to Stay the Proceedings

10/1/97

Order Granting Motion to Stay Proceedings

JA-3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
CIVIL DIVISION

RONALD R. YESKEY,	)	CIVIL ACTION NO.
Plaintiff,)	
	)	94 2180
vs.)	
	)	JURY TRIAL DEMANDED
THE COMMONWEALTH OF)	
PENNSYLVANIA	)	I HEREBY CERTIFY THE WITHIN
DEPARTMENT OF	)	TO BE A TRUE AND CORRECT
CORRECTIONS,	)	COPY OF THE ORIGINAL.
JOSEPH D. LEHMAN,)	
JEFFREY A. BEARD, Ph.D.,)	
JEFFREY K. DITTY,	)	/s/ L. Abraham Smith
DOES NUMBER 1 THROUGH)	
20, INCLUSIVE,	)	L. Abraham Smith, Esq.
Defendants.	)	Attorney for Plaintiff

COMPLAINT

Plaintiff, Ronald R. Yeskey, brings this complaint by and through his attorney, L. Abraham Smith, Esquire, and alleges as follows:

INTRODUCTION (PARTIES AND JURISDICTION)

1. Plaintiff Ronald R. Yeskey is a [sic] adult citizen of the United States and the Commonwealth of Pennsylvania, and a resident of Hempfield Township, Westmoreland County, Pennsylvania. At all times pertinent hereto Plaintiff was and has been incarcerated in the custody of the Defendant Commonwealth of Pennsylvania Department of Corrections, within the custody and control of said Defendant and their employees.

2. Plaintiff brings this civil rights action to enforce Plaintiff's rights under the Americans With Disabilities Act of 1990 (42 U.S.C. §12101, et seq.), and to redress the deprivation under color of state law of rights, privileges and immunities secured to Plaintiff by provisions of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 1 of the Pennsylvania Constitution. Plaintiff alleges that he has been denied access to programs, opportunities and ben-

efits offered by the Defendant Department of Corrections on the basis that he is a qualified person with a disability. Plaintiff alleges further that the aforementioned acts and/or policies and practices of Defendants and their employees are knowing, deliberate and intentional, in disregard for the rights, health and well-being of Plaintiff, and that such acts, policies and practices are contrary to law, shocking to the conscience of civilized persons, and intolerable in a society purportedly governed by laws and considerations of due process.

3. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4). Plaintiff's claims are authorized by 28 U.S.C. §§ 2201 and 2202. The substantive claims herein arise under the Americans With Disabilities Act of 1990 (42 U.S.C. § 12101, et seq.); 42 U.S.C. § 1983; and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff further invokes the supplemental jurisdiction of this Court pursuant to 28 U.S.C. § 1367 to hear and decide claims arising under state law and based upon a common nucleus of operative fact.

4. Defendant, Commonwealth of Pennsylvania Department of Corrections is an agency of the Commonwealth of Pennsylvania possessing the corporate power to sue and be sued. Its principal mailing address is P.O. Box 598, Camp Hill, Pa., 17001-0598, and its main office is located at 2520 Lisburn Road, Camp Hill, Pa., 17001. The Department is delegated the responsibility for the administration and supervision of the correctional facilities within the state correctional system, including the maintenance of facilities and programs relative thereto, and the promulgation, administration, and enforcement of rules and regulations governing the conduct of such facilities and programs, and the protection of the rights of the citizenry of the Commonwealth of Pennsylvania.

5. Defendant Joseph D. Lehman, is a resident of the Commonwealth of Pennsylvania and is and always has been, at all times pertinent hereto, the Commissioner of the Commonwealth of Pennsylvania, Department of Corrections. His principal mailing address is P.O. Box 598, Camp Hill, Pa., 17001-0598, and the location of his office is 2520 Lisburn Road, Camp Hill, Pa., 17001. Defendant is responsible for the administration, operation

and supervision of the Department, and for the promulgation and enforcement of rules, regulations, policies and practices relevant thereto, and at all times relevant hereto was acting in that capacity and under color of state law. Defendant is sued herein individually and in his official capacity as to Count I; as to Counts II and III, Defendant is sued in his individual capacity only.

6. Defendant Jeffrey A. Beard, Ph.D., is a resident of the Commonwealth of Pennsylvania and is and always has been, at all times pertinent hereto, the Superintendent of the State Correctional Institution at Camp Hill, Pa. His principal office is SCI - Camp Hill, P.O. Box 8837, Camp Hill, Pa., 17001-8837. Defendant is responsible for the administration, operation and supervision of said Institution, and for the promulgation and enforcement of rules, regulations, policies and practices relevant thereto, and at all times relevant hereto was acting in that capacity and under color of state law. Defendant is sued herein individually and in his official capacity as to Count I; as to Counts II and III, Defendant is sued in his individual capacity only.

7. Defendant Jeffrey K. Ditty is a resident of the Commonwealth of Pennsylvania and is and always has been, at all times pertinent hereto, the Director of the Central Diagnostic and Classification Center, Unit #2, of the State Correctional Institution at Camp Hill, Pa. His principal office is SCI - Camp Hill, P.O. Box 8837, Camp Hill, Pa., 17001-8837. Defendant is responsible for the administration, operation and supervision of the selection of inmates for the Motivational Boot Camp Program, and for the promulgation and enforcement of rules, regulations, policies and practices relevant thereto, and at all times relevant hereto was acting in that capacity and under color of state law. Defendant is sued herein individually and in his official capacity as to Count I; as to Counts II and III, Defendant is sued in his individual capacity only.

8. Defendants, Does number 1 through 20, inclusive, are persons employed or contracted by the named Defendants, or persons whose actions are otherwise responsible for the violations of the statutes and constitutional rights alleged in this action. The identifies [sic] of such persons are at the time of the filing of this complaint unknown, and are expected to be ascertained through the normal processes of discovery.

PRELIMINARY FACTS:

9. Commencing in May, 1994 Plaintiff Ronald R. Yeskey was committed to the custody of Defendant Commonwealth of Pennsylvania, Department of Corrections, by order of the Honorable Richard E. McCormick, Jr., Court of Common Pleas, Westmoreland County, Pennsylvania, to serve a sentence of eighteen (18) to thirty-six (36) months incarceration, following a guilty plea entered in state criminal court.

10. At the time of sentencing, the Court's sentencing order included a recommendation that Plaintiff be placed in the Defendant Department of Corrections' Motivational Boot Camp program, which program would have conferred upon Plaintiff the statutory benefit of being released on parole upon successful completion of said program (which program was approximately six (6) months in duration.)

11. On or about July 1, 1994, while in Defendant's custody and housed at the Central Diagnostic and Classification Center at the State Correctional Institution at Camp Hill, Pennsylvania, Plaintiff was notified by the Defendant Department of Corrections that said Defendant had determined that Plaintiff was ineligible for participation in the Motivational Boot Camp program. The said Defendant based this decision on the fact that the Plaintiff was medically disapproved for participation in the program due to a medical history of hypertension (on medication).

12. Despite repeated requests by Plaintiff, the Defendant Department of Corrections failed and refused to reconsider their decision deeming Plaintiff ineligible for participation in the Motivational Boot Camp program; further, the Department of Corrections has failed and refused to establish and/or advise Plaintiff of any alternative program offering to disabled persons such as the Plaintiff the same benefits as the Motivational Boot Camp Program.

COUNT I: CLAIMS PURSUANT TO TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990 (42 U.S.C. §12101, et seq.)

13. Plaintiff hereby incorporates by reference paragraphs 1 through 12 of this complaint as though fully set forth at length herein.

14. That Ronald R. Yeskey is a qualified individual with a disability, within the meaning of the ADA.

15. That the Commonwealth of Pennsylvania, Department of Corrections is a public entity within the meaning of the ADA.

16. That the Motivational Boot Camp program is a service, program, or activity of a public entity within the meaning of the ADA.

17. That the Department of Corrections denied Plaintiff admission to the Motivational Boot Camp Program solely based upon his status as an individual with a disability.

18. That the actions of the Department of Corrections constitute a violation of the ADA, by specifically violating the provisions of said statute and the regulations promulgated thereunder by the United States Department of Justice, in the following respects:

i.) by denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service offered by the public entity;

ii.) by affording a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

iii.) by providing a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

iv.) by otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service; and,

v.) by utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

vi.) by utilizing criteria or methods of administration that have the purpose or effect of substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.

WHEREFORE, the Plaintiff claims the damages specified hereinafter, jointly and severally, against each defendant.

COUNT II: CIVIL RIGHTS CLAIMS PURSUANT TO 42 U.S.C. §1983

19. Plaintiff hereby incorporates by reference paragraphs 1 through 18 of this complaint as though fully set forth at length herein.

20. Defendants, their agents and employees, with knowledge of Plaintiff's circumstances, and/or with deliberate indifference to such circumstances, have acted or failed to act in such a way as to deprive Plaintiff of the equal protection of the law. Such acts and omissions of the Defendants violate rights secured to the Plaintiff under the Fourteenth Amendment to the United States Constitution.

21. Defendants, their agents and employees, with knowledge of Plaintiff's circumstances, and/or with deliberate indifference to such circumstances, have acted or failed to act in such manner as to inflict upon Plaintiff cruel and unusual punishment. Such acts and omissions of the Defendants violate rights secured to the Plaintiff under the Eighth Amendment to the United States Constitution.

22. Defendants, their agents and employees, with knowledge of Plaintiff's circumstances, and/or with deliberate indifference to such circumstances, have acted or failed to act in such manner as to violate Plaintiff's rights established by the ADA and the regulations promulgated thereunder.

23. The Defendants' aforesaid actions and/or omissions were intentional and/or wilful and/or intentional.

24. The Defendants' aforesaid actions and/or omissions were committed under color of law and/or pursuant to policies,

customs, practices, rules, regulations, ordinances, statutes and/or usage of the Commonwealth of Pennsylvania Department of Corrections.

WHEREFORE, the Plaintiff claims the damages specified hereinafter, jointly and severally, against each defendant.

COUNT III: CLAIM FOR VIOLATION OF CIVIL RIGHTS GUARANTEED BY THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA.

25. Plaintiff hereby incorporates by reference paragraphs 1 through 18 of this complaint as though fully set forth at length herein.

26. Plaintiff invokes the supplemental jurisdiction of this Court pursuant to 28 U.S.C. §1367 to hear and decide claims arising under state law and based upon a common nucleus of operative fact with those in Count 1.

27. At all times relevant hereto the Defendants were acting under color of authority granted them by the laws of the Commonwealth of Pennsylvania.

28. As a result of the intentional and/or wilful actions of the Defendants, the Plaintiff's rights as a citizen of the Commonwealth of Pennsylvania, being born free and independent, and having certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing his own happiness, as guaranteed by Article I, section 1 of the Constitution of the Commonwealth of Pennsylvania were infringed and denied by the Defendants, acting both jointly and severally.

WHEREFORE, the Plaintiff claims the damages specified hereinafter, jointly and severally, against each defendant.

DAMAGES:

29. As a result of the conduct of all Defendants, the Plaintiff has suffered, and will continue to suffer, damages including, but not limited to, violations of Plaintiff's rights established by the

Americans With Disabilities Act of 1990, and the Constitutions of the Commonwealth of Pennsylvania and of the United States of America.

30. As a result of the conduct of Defendants, the Plaintiff has suffered, and will continue to suffer, continued incarceration beyond that imposed upon similarly situated non-disabled persons incarcerated within the facilities of the Pennsylvania Department of Corrections.

31. As a result of the conduct of Defendants, the Plaintiff has suffered, and will continue to suffer, mental stress, mental anguish and trauma, emotional distress, humiliation, depression, interference with social relations, loss of enjoyment of life, suffering and inconvenience.

32. As a direct and proximate result of the injuries sustained, Plaintiff has been deprived, and will continue to be deprived of the ordinary pleasures of life.

33. As a direct and proximate result of the injuries sustained, Plaintiff has in the past suffered and will continue to suffer a loss of earnings, and/or his earning power has been diminished or lessened and/or will continue to be diminished or lessened.

34. As a direct and proximate result of the above described actions and omissions of Defendants, Plaintiff has suffered general damages, exclusive of interest and costs, the exact amounts of which will be proven at trial.

35. To the extent that monetary damages are in themselves inadequate, and Plaintiff has been suffering and will continue to suffer irreparable harm from Defendants' actions, policies, and procedures, and from the violations of the laws complained of herein; accordingly, declaratory and injunctive relief is necessary and appropriate.

WHEREFORE, Plaintiff respectfully prays:

- a.) That this Court assume jurisdiction;
- b.) That this Court award Plaintiff monetary damages as permitted by law, including punitive damages;
- c.) That this Court issue a declaratory judgment and a preliminary and permanent injunction to immediately enjoin Defen-

dants from administering the Motivational Boot Camp Program without complying with Title II of the ADA and the federal regulations promulgated thereunder;

d.) That this Court issue a declaratory judgment and a preliminary and permanent injunction to immediately enjoin Defendants from detaining Plaintiff in their custody beyond the chronological point when Plaintiff would have been released had he been admitted to and successfully completed the Boot Camp Program (which is the tangible benefit associated with the program by state statute);

e.) That this Court preliminarily and permanently enjoin Defendants to submit plans to the Court for implementation of the aforesaid;

f.) Award the Plaintiff the costs of bringing this action, and award reasonable fees and expenses to Plaintiff's attorney; and,

g.) That this Court award such additional or alternative relief as may be just, proper and equitable.

Respectfully submitted,

DATED: 12/19/94

/s/ L. Abraham Smith

L. Abraham Smith, Esquire
Attorney for Plaintiff.

Pa. I.D. #69020

P.O. Box 1644

Greensburg, PA 15601-7644

(412) 423-8614

DEMAND FOR JURY TRIAL

Plaintiff Ronald R. Yeskey, by and through his undersigned attorney, hereby demands a trial by jury as to all issues so triable herein.

DATED: 12/19/94

/s/ L. Abraham Smith

L. Abraham Smith, Esquire
Attorney for Plaintiff.
Pa. I.D. #69020

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)
Plaintiff,)

v.)

THE COMMONWEALTH OF)
PENNSYLVANIA DEPARTMENT)
OF CORRECTIONS,)
JOSEPH D. LEHMAN,)
JEFFREY A. BEARD, Ph.D.,)
JEFFREY K. DITTY, DOES)
NUMBER 1 THROUGH 20,)
INCLUSIVE,)

Defendants.)

Civil Action No. 94-2180
Judge Alan N. Bloch/
Magistrate Judge Sensenich

**MOTION TO DISMISS, OR, IN THE ALTERNATIVE,
MOTION TO TRANSFER**

Defendants, by their attorneys, Ernest D. Preate, Jr., Attorney General, Gloria A. Tischuk, Deputy Attorney General, and John G. Knorr, III, Chief Deputy Attorney General, Chief, Litigation Section, move, pursuant to Rule 12(b)(3), to dismiss this action due to improper venue, or, in the alternative, to transfer this action; and, also, pursuant to Article III, and the Eleventh Amendment, for lack of jurisdiction and, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and, in support, submit the following:

1. Plaintiff is Ronald R. Yeskey, an inmate currently incarcerated at the State Correctional Institution at Greensburg, in Westmoreland County, Pennsylvania.

2. Plaintiff does not complain about any event or incident that occurred at the State Correctional Institution at Greensburg, or, in Westmoreland County, Pennsylvania, or, in the Western District of Pennsylvania.

3. The Defendants are: The Commonwealth of Pennsylvania, Department of Corrections; the former Superintendent of the Department, Joseph D. Lehman, in Harrisburg, Pennsylvania; Jeffrey A. Beard, the Superintendent at the State Correctional Institution at Camp Hill, Pennsylvania; Jeffrey K. Ditty, the

Director of the Central Diagnostic and Classification Center at the State Correctional Institution at Camp Hill, Pennsylvania. Plaintiff has also included in the caption unnamed "John Doe" defendants, none of whom are identified and none of whom have been served.

4. All of the Defendants are located in the Middle District of Pennsylvania.

5. Plaintiff's complaint arises from the alleged refusal of the individual defendants to permit him to participate in the Motivational Boot Camp program due to his medical history of hypertension, on medication, and the plaintiff's conclusion that this denial violated Title II of the Americans with Disabilities Act.

6. Plaintiff also includes separate Counts under the federal civil rights act, 42 U.S.C. Section 1983, for violation of plaintiff's fifth, eighth and fourteenth amendment rights, and for alleged violations of the rights guaranteed by the Pennsylvania Constitution.

7. Defendants move to dismiss these counts on the following grounds:

A. The complaints based upon the Pennsylvania Constitution and 42 U.S.C. Section 1983 against the Commonwealth of Pennsylvania and the Department of Corrections are barred by the eleventh amendment.

B. The complaints based upon the Pennsylvania Constitution and 42 U.S.C. Section 1983 against the individual defendants in their official capacities for damages are barred by the eleventh amendment. Although plaintiff alleges that defendants are sued in their individual capacities, his allegations arise from their official supervisory positions and is [sic] premised on theories of respondeat superior or vicarious liability.

C. Neither the Commonwealth, the Department nor the individual defendants in their official capacities are "persons" within the meaning of Section 1983; and, therefore, the complaints alternatively fail to state a claim upon which relief can be granted.

D. All claims under state law are alternatively barred by the Pennsylvania Sovereign Immunity Act.

E. The complaint, in general, fails to state a claim upon which relief can be granted.

F. Venue in the United States District Court for the Western District of Pennsylvania is improper.

8. In his complaint, plaintiff alleges that the actions or decisions about which he complains were made in the Middle District of Pennsylvania by the individual defendants, who are all located in the Middle District of Pennsylvania.

9. Section 1391(b) of the United States Judicial Code, 28 U.S.C. Section 1391(b), provides that a civil action, other than one based on diversity of citizenship, may be brought in the judicial district where any defendant resides, in the judicial district where a "substantial part of the events or omissions giving rise to the claim occurred," or where any defendant may be found.

10. The complaint alleges, and there is no dispute, that all defendants reside in the Middle District and that the alleged events or omissions giving rise to the claim occurred in the Middle District.

11. Since this is the case, and venue is improper, then pursuant to Section 1406, 28 U.S.C. Sec. 1406, provides that the case "laying venue in the wrong division or district", shall be dismissed.

12. Alternatively, Section 1406 also provides that "if it [is] in the interest of justice," the case may be transferred to any district in which it could have been brought.

13. In this case, the United States District Court for the Middle District of Pennsylvania is the district where this civil action could have been brought.

14. In addition to protecting litigants, witnesses and the public from unnecessary expense and inconvenience, and to avoid a waste of time, energy and money, all of the relevant considerations for venue purposes reveal that this case, if not dismissed for improper venue, should be transferred to the United States District Court for the Middle District of Pennsylvania.

15. This motion to dismiss or alternatively to transfer on grounds of improper venue is not meant and is not intended to waive, and the defendants are not waiving the constitutional immunity conferred by the Eleventh Amendment or any statutory immunity conferred as a matter of state law, or any ground for dismissal set forth in this motion, should any transfer occur.

JA-16

WHEREFORE, it is requested that this motion be granted and that the proposed order be entered, dismissing this action with prejudice or, alternatively, transferring this action for disposition of these matters by the United States District Court for the Middle District of Pennsylvania.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

By: /s/ Gloria A. Tischuk

Gloria A. Tischuk
Deputy Attorney General
PA ID. 44155

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

OFFICE OF ATTORNEY GENERAL
4th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Date: April 21, 1995

JA-17

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)
Plaintiff,)

v.)

THE COMMONWEALTH OF)
PENNSYLVANIA DEPARTMENT)
OF CORRECTIONS,)
JOSEPH D. LEHMAN,)
JEFFREY A. BEARD, Ph.D.,)
JEFFREY K. DITTY, DOES)
NUMBER 1 THROUGH 20,)
INCLUSIVE,)

Defendants.)

Civil Action No. 94-2180
Judge Alan N. Bloch/
Magistrate Judge Sensenich

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion to Dismiss, Or, In the Alternative, Motion to Transfer was served upon the following via first-class mail on April 21, 1995.

L. Abraham Smith, Esquire
P.O. Box 1644
Greensburg, PA 15601-7644

/s/ Gloria A. Tischuk

Gloria A. Tischuk
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
4th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Date: April 21, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)	
Plaintiff,)	
)	
v.)	
)	
THE COMMONWEALTH OF	)	Civil Action No. 94-2180
PENNSYLVANIA DEPARTMENT	)	Judge Alan N. Bloch/
OF CORRECTIONS,	)	Magistrate Judge Sensenich
JOSEPH D. LEHMAN,)	
JEFFREY A. BEARD, Ph.D.,)	
JEFFREY K. DITTY, DOES)	
NUMBER 1 THROUGH 20,)	
INCLUSIVE,)	
Defendants.)	

ORDER OF COURT

AND NOW, this _____ day of _____, 1995, upon consideration of the foregoing motion to dismiss, or, in the alternative, to transfer, it is hereby **ORDERED** that this motion is **GRANTED**.

I.

It is hereby **ORDERED** that this action is **DISMISSED** with prejudice.

II.

It is hereby **ORDERED** that the motion to transfer this action is **GRANTED** and that this action is transferred to the United States District Court for the Middle District of Pennsylvania.

By the Court:

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)	
Plaintiff,)	
)	
v.)	
)	
THE COMMONWEALTH OF	)	Civil Action No. 94-2180
PENNSYLVANIA DEPARTMENT	)	Judge Alan N. Bloch/
OF CORRECTIONS,	)	Magistrate Judge Sensenich
JOSEPH D. LEHMAN,)	
JEFFREY A. BEARD, Ph.D.,)	
JEFFREY K. DITTY, DOES)	
NUMBER 1 THROUGH 20,)	
INCLUSIVE,)	
Defendants.)	

**SUPPLEMENT TO THE COMMONWEALTH
DEFENDANTS' MOTION TO DISMISS,
OR, IN THE ALTERNATIVE,
MOTION TO TRANSFER**

The Commonwealth Defendants, by their attorneys, Ernest D. Preate, Jr., Attorney General, Gloria A. Tischuk, Deputy Attorney General, and John G. Knorr, III, Chief Deputy Attorney General, Chief, Litigation Section, file this as a supplement to their motion to dismiss, or, in the alternative, motion to transfer; and submit the attached:

- (1) Declaration of Clifford D. Swift;
- (2) Quehanna Boot Camp Physical Fitness Manual.

The Commonwealth Defendants restate and incorporate by reference in this supplement the said motion dated April 21, 1995, and the brief filed in support dated May 24, 1995.

WHEREFORE, the Commonwealth Defendants move to dismiss this action, or, alternatively, to transfer this action to the Middle District.

JA-20

Respectfully submitted,
ERNEST D. PREATE, JR.
Attorney General

By: /s/ Gloria A. Tischuk

Gloria A. Tischuk
Deputy Attorney General
PA ID. 44155

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

OFFICE OF ATTORNEY GENERAL

4th Floor, Manor Complex

564 Forbes Avenue

Pittsburgh, PA 15219

Date: June 7, 1995

JA-21

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

RONALD R. YESKEY,)	
Plaintiff	)	CV-94-2180
)	
v.	)	(Judge Bloch)
)	
THE COMMONWEALTH OF)	
PENNSYLVANIA DEPARTMENT	)	(Magistrate Judge Sensenich)
OF CORRECTIONS,)	
JOSEPH D. LEHMAN,)	
JEFFREY A. BEARD, Ph.D.,)	
DOES NUMBER 1 THROUGH 20,)	
INCLUSIVE,)	
Defendants)	

DECLARATION OF CLIFFORD D. SWIFT

I, Clifford D. Swift, hereby declare under penalty of perjury that the following statements are true and correct based upon my personal knowledge and belief.

1. I am employed by the Commonwealth of Pennsylvania, Office of General Counsel, as attorney for the Department of Corrections.

2. The attached Physical Fitness Manual is a true and correct copy of the manual utilized at the Department of Corrections, Quehanna Motivational Boot Camp.

/s/ Clifford D. Swift

Clifford D. Swift

Executed this 30th day of May, 1995

QUEHANNA BOOT CAMP PHYSICAL FITNESS[SIC] MANUAL



BY: LT. G.D. McMAHON

QUEHANNA BOOT CAMP PHYSICAL FITNESS [SIC] MANUAL

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Appendix

1. Quehanna Boot Camp Physical Fitness Scoring Standards (Army Physical Fitness Standards Test Standards).
 - a. Male/Female Push-Up
 - b. Male/Female Sit-Ups
 - c. Male/Female 2-Mile Run
2. Quehanna Boot Camp Physical Fitness Test Scorecard
3. Quehanna Boot Camp Remedial P/T Checklist
4. Quehanna Boot Camp Weekly Remedial P/T Fitness Test Scorecard
5. Quehanna Boot Camp Physical Fitness Lesson Plan

Introduction

The information in this manual consists of the Physical Fitness Program that is currently being taught at the PENNSYLVANIA DEPARTMENT OF CORRECTIONS QUEHANNA BOOT CAMP.

This information was taken from the United States Army's Master Physical Fitness FM 21-20 and the Marine Corps Institute Manual MC 17107C. Some of the exercises have been rephased to accommodate the current organization at the Quehanna Boot Camp.

This program develops both the upper and lower body, plus cardio-respiratory endurance. This well organized training program will instill discipline, motivation and team work. It must have strict supervision. Instructors must be able to lead Physical Training with proper commands and knowledge of the exercises.

At the end of each phase, each Inmate will be given a physical fitness tests [sic] using the U.S. Army Physical Readiness Scorecard (See Appendix I). If the Inmate fails this test he/she will be assigned to the Remedial P/T Platoon. At which time, they will not only do their regularly scheduled physical training in the morning, but they will also attend the afternoon session. He/She will stay on this status until they come up to standards and pass the test which will be given to them every weekend.

FORMING FOR P.T.

The Extended Rectangular Formation is used with platoons or companies. It can be formed when platoons are in a line formation (side by side) or a column formation (behind each other).

The instructor should always be centered on the formation when extended. This can be done by having the platoon(s) fall in to the far left of the instructor when facing the platoon. When the formation is extended, it will then be centered on the instructor.

EXTEND TO THE LEFT, "MARCH" — On the command of execution "MARCH", inmates in the right flank file stand fast with their arms extended to the sides at shoulder level. All other inmates will turn to the left and double time forward. After taking a sufficient number of steps, all inmates

will face the front; each has both arms extended to the sides at shoulder level. The distance between the fingertips is approximately 12 inches and dress is right.

ARMS DOWNWARD, "MOVE" — On the command of execution "MOVE", the inmates will lower their arms smartly to their sides.

LEFT, "FACE" — Inmates execute the left face movement.

EXTEND TO THE LEFT, "MARCH" — On the command of execution "MARCH", inmates in the right flank file stand fast with their arms extended to the sides shoulder level. All other inmates will turn to their left and double time forward. After taking the sufficient number of steps, all inmates will face the front; each has both arms extended to the sides at shoulder level. The distance between the fingertips is approximately 12 inches and dress is right.

ARMS DOWNWARD, "MOVE" — On the command of execution "MOVE", all inmates will lower their arms smartly to their sides.

RIGHT, "FACE" — All inmates will execute the right face movement.

FROM FRONT TO REAR, "COUNT OFF" — On the command of execution "OFF", the leading inmate in each column turns his/her head to the right rear and sounds off with "ONE" and faces the front. Each successive column will repeat the actions of the front column and sound off in turn with "TWO", "THREE", "FOUR" and so on.

EVEN NUMBERS TO THE LEFT, "UNCOVER" — On the command of execution "UNCOVER", all even numbered inmates will jump to their left squarely in the center of the interval, bringing their feet together. The unit is now ready for stretching and warm-up exercises.

Upon completion of the stretching and warm-up exercises, the instructor will dismount the P.T. stand and center

himself/herself on the platoon as if it were at normal interval. The instructor will then bring the platoon back to normal interval by giving the following commands.

ASSEMBLE TO THE RIGHT, "MARCH" — On the command of execution "MARCH", all inmates will double time to their original positions before being extended, in column or line formation (at normal interval).

FORMAT FOR P.T. EXERCISES

The following format is used to conduct Physical [sic] Training at Quehanna Boot Camp. After Inmates have been instructed on proper exercises procedure. [sic] Approximately two weeks into the program, step 6,7 and 8 can be deleted from the format.

1. The next exercise is _____. (Inmates repeat the name of the exercise. [sic])
2. It is a _____ count exercise.
3. We will do _____ repetitions [sic] of this exercise.
4. I will count the cadence, you will count the repetitions [sic].
5. You will go to your left, I will go to my right.
6. I will now demonstrate:
7. Stand at Ease
 - (Demonstration)
 - A. Starting position move.

On the command starting position move, describe how to get into the starting position.
 - B. Explain the exercise by the numbers.
 - C. Do exercise in cadence.
 - D. Ask — Are there any questions?
8. Platoon / Squad Attention.
9. Starting position move.
10. In cadence — exercise, 1-2-3-1, 1-2-3-2, etc., 1-2, AND HALT.
11. Recover (Position of attention)
12. Raise Right Hand. Staff/Inmates hold hands in front of them and double time in place until D.I. lowers hand.
13. Repeat No. 1 - 12 for each exercise, until all stretches and exercises are completed.

WARM-UP / STRETCHING

Proper warm-up is needed before each physical training session. This helps to prepare the body for vigorous exercise, and will help prevent injuries. Stretching is a major part of the warm-up procedures.

The following stretching exercises will be used at Quehanna Boot Camp.

1. Neck Stretch
2. One-Arm Side Stretch
3. Ham-String Stretch
4. Ankle Stretch
5. Groin Stretch –
6. Upper Back Stretch

The following pages have detailed instructions on each exercise.

NECK STRETCH

This is a four count exercise.

The commands for this exercise are, In Cadence, Exercise/ Recover.

This exercise is done at a slow cadence. The instructor will go in the opposite direction to create a mirror effect.

The instructor will count the cadence, inmates will count the repetitions.

NOTE: To halt this exercise, the instructor will elevate his/her voice on the last repetition, saying "1, 2, AND HALT!". Inmates will say "AND, HALT!" with the instructor.

Neck Stretch — Starting Position, MOVE.

On the command of execution, "MOVE", spread your legs shoulder width apart, knees slightly bent and keeping your body straight from head to toe. Place your hands on your hips, thumbs pointing towards the small of your back, and elbows will be back.

Action — In Cadence / "Exercise"

On the command of execution "EXERCISE", and for the count of one tilt your head to the left shoulder. For the count of two, tilt your head backwards keeping the rest of your body straight. For the count of three, tilt your head to the right shoulder. For the count of four, return to the starting position. You will stay in cadence with the instructor until all repetitions are completed.

The next commands are "Switch Direction" — "In cadence, EXERCISE". On the command of execution "EXERCISE", and for the count of one, tilt your head to the right shoulder. For the count of two, tilt your head backwards. For the count of three, tilt your head to the left shoulder. For the count of four, return to the starting position. On the command of "RECOVER", you will quickly return to the position of attention. Are there any questions?

ONE ARM SIDE STRETCH

There are no counts to this exercise.

The commands for this exercise are READY—"STRETCH", "AND HALT"/ RECOVER.

Each stretch will last for approximately 10 — 15 seconds.

The instructor will go in the opposite direction to create a mirror effect.

The instructor will call all commands.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying "AND HALT". Inmates will say "AND HALT" with the instructor.

ONE ARM SIDE STRETCH — STARTING POSITION/ "MOVE"

On the command of execution, "MOVE", spread your feet shoulder width apart, raise your right arm over your head fingers extended and your left arm down at your side, fingers extended, palm facing the leg.

ACTION — READY, "STRETCH"

On the command of execution "STRETCH", bend your body to the left and hold for approximately 10 - 15 seconds. On the command "AND HALT", move back to the starting position. You will continue until all repetitions are completed for the left side. Next command will be "SWITCH SIDES". Change your position by extending your left arm with your right arm to your side as you did for the first part of the exercise. On the command of "READY — STRETCH", bend your body to the right and hold for approximately 10 - 15 seconds. On the command of "AND HALT", move back to the starting position. You will continue until all repetitions are completed for the right side. On the com-

mand "RECOVER", you will quickly move back to the position of attention. Are there any questions?

HAM STRING STRETCH

There are no counts to this exercise.

The commands for this exercise are "READY — STRETCH", "AND HALT"/ "RECOVER".

Each stretch will last approximately 10 — 15 seconds.

The instructor will go in the opposite direction to create a mirror effect.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying, "AND HALT!". The inmates will say "AND HALT!" with the instructor.

The instructor will call all commands.

HAM STRING STRETCH — STARTING POSITION "MOVE"

On the command of execution, "MOVE", take one 30 inch step forward with your left foot, place your right hand on the deck to assist you into the sitting position. Extend your left leg forward, toe pointing upward, your right foot will be tucked in the groin area. Your legs will be flat on the deck.

ACTION — READY, "STRETCH"

On the command of execution, "STRETCH", bend forward from the hips, keeping the back and head in a comfortable straight line, stretching your arms out to the left toe. Hold this stretch for 10 — 15 seconds. On the command "AND HALT!", move back to the starting position. You will continue as commanded until the left side stretches are completed. The next command will be "SWITCH LEGS". Change your position by extending your right leg with the toe pointing upward and tucking your left foot into the groin area. "READY, STRETCH". On the command of execution of "STRETCH", bend forward from the hips, keeping a comfortable straight line with your back and head, stretching your arms out to the right toe. On the command "AND HALT!", move back to the starting position. You will continue until the right leg stretches are completed. On the command, "RECOVER", you will quickly move back to the position of attention. Are there any questions?

ANKLE STRETCH

This is a four count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE"/ "RECOVER".

This exercise is done at a slow cadence.

The instructor will go in the opposite direction to create a mirror effect.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying "1, 2, AND HALT!". Inmates will say "AND HALT!" with the instructor.

The instructor will call the cadence, the inmates will count the repetitions.

ANKLE STRETCH — STARTING POSITION, "MOVE!"

On the command of execution "MOVE", take one 30 inch step forward with your left foot, placing your right hand on the deck to assist you into the sitting position. Extend your left leg forward, left toe pointing upward. Move your right leg across the left leg, crossing the right calf on top of your left thigh. Grasp your right toe with your left hand and your ankle with your right hand.

ACTION — IN CADENCE, "EXERCISE"

On the command of execution, "EXERCISE", and for the count of one, start rotating the ankle in a clockwise rotation. For the counts of two and three continue in the clockwise rotation. For the count of four, you should be at the starting position completing one repetition. You will continue until all repetitions are completed. On the command "SWITCH DIRECTIONS" — IN CADENCE, "EXERCISE", on the command of execution of "EXERCISE" and for the count of one, you will rotate your ankle in a counter clockwise [sic] rotation. For the counts of two and three you will continue in the counterclockwise rotation. For the count of four, you should be at the starting position and completing one full repetition. You will continue until all repetitions are completed. The next command will be "SWITCH LEGS". Change your position by extending your right leg forward, toe pointing upward and moving the left leg across the right leg, crossing your left calf on top of your left thigh. Grasp your left toes with your right hand and your ankle with your left hand.

IN CADENCE, "EXERCISE". On the command of execution, "EXERCISE" and for the count of one, you start rotating in a

clockwise rotation. For the counts of two and three, continue rotating in the clockwise rotation. For the count of four, you should be at the starting position, completing one repetition. You will continue in cadence until all repetitions are completed. On the command "SWITCH DIRECTIONS" — IN CADENCE, "EXERCISE" on the command of execution "EXERCISE!", and for the count of one, you will start rotating your ankle in a counter-clockwise [sic] rotation. For the counts of two and three, you will continue in a counter-clockwise [sic] rotation. For the count of four, you should be at the starting position and completing one full repetition. You will continue in cadence until all repetitions are completed. On the command "RECOVER", you will quickly move to the position of attention. Are there any questions?

GROIN STRETCH

There are no counts to this exercise.

The commands for this exercise are READY, "STRETCH" — AND "HALT!" / "RECOVER".

This exercise should last 10 — 15 seconds per stretch.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying AND "HALT!". The inmates will say AND "HALT!" with the instructor.

The instructor will call all commands.

GROIN STRETCH — STARTING POSITION, "MOVE!"

On the command STARTING POSITION, "MOVE!", you will take one 30 inch step forward with your left foot, placing your right hand on the deck to assist you into the sitting position. Grasp your toes with your hands and pull your toes inward close to the torso. Elbows will be inside of your legs touching your thighs.

ACTION: READY, "STRETCH!"

On the command of execution, "STRETCH", bend forward from your hips, pushing down slightly with your elbows and hold for 10 - 15 seconds. The next command will be AND, "HALT!". On this command return to the starting position. You will continue until all repetitions are completed. On the command "RECOVER", you will quickly move back to the position of attention. Are there any questions?

UPPER BACK STRETCH

There are no counts to this exercise.

The commands for this exercise are READY, "STRETCH" — AND "HALT!" / "RECOVER".

This exercise should last 10 - 15 seconds per stretch.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying AND "HALT!". The inmates will say AND "HALT!" with the instructor.

The instructor will call all the commands.

UPPER BACK STRETCH—STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", spread your feet approximately shoulder width apart, extending your arms out parallel with the deck in front of your chest, fingers will be interlocked with your palms facing outwards.

ACTION: READY, "STRETCH!"

On the command of execution "STRETCH!", push the upper portion of your body forward, keeping your hips stationary and stretching the upper back muscles. On the command AND "HALT!", return back to the starting position. You will continue until all repetitions are completed. The next command you will receive is "RECOVER!". You will then move quickly back to the position of attention. Are there any questions?

CARDIOVASCULAR

Cardiovascular endurance is needed to help the body deliver nutrients and oxygen needed for muscular activity and transports waste products from the cells.

The following cardiovascular exercises will be used at the Quehanna Boot Camp.

1. Side Straddle Hop
2. Side Bender
3. Turn and Bounce
4. Turn and Bend
5. Stationary Run
6. Squat Thrust

The following pages have detailed instructions on cardiovascular exercises.

SIDE STRADDLE HOP

This [sic] a four count exercise.

The commands for this exercise are, IN CADENCE, "EXERCISE" / "RECOVER".

This exercise is done at a fast cadence.

To halt this exercise, the instructor will elevate his/her voice by saying 1, 2, AND, "HALT!". Inmates will say AND, "HALT!" with the instructor.

The instructor will count the cadence, inmates will count the repetitions.

THE SIDE STRADDLE HOP: STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", you will stay at the position of attention.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, jump up slightly moving your legs slightly more than shoulder's [sic] width apart, at the same time swing your arms overhead and clap your hands together. For the count of two, jump up slightly and swinging your arms sideward and downward while bringing your feet together to the starting position. For the count of three, repeat the actions for count one, and for count four, repeat the actions for count two, completing one repetition. You will continue in cadence until all repetitions are completed. The next command will be "RECOVER!" at which time you will adjust yourself to the position of attention. Are there any questions?

SIDE BENDER

This [sic] a eight count exercise.

The commands for this exercise are, IN CADENCE, "EXERCISE" and "RECOVER".

This exercise is done at a slow to moderate cadence.

The instructor will go in the opposite direction to create a mirror effect.

To Halt this exercise, the instructor will elevate his/her voice by saying, 1, 2, 3, 4, 5, 6, AND, "HALT!". The inmates will say AND, "HALT!" with the instructor.

The instructor will count the cadence, the inmates will count the repetitions.

SIDE BENDER — STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", spread your feet shoulder width apart, raise your arms overhead with your palms facing to the front and touching, keeping elbows and knees locked throughout the exercise.

ACTION: INCADENCE, [sic] "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, bend to the left as far as possible; recover slightly. For the count of two and three, repeat the actions of count one. For the count of four, recover sharply to the starting position. For the count of five, bend to the right as far as possible; recover slightly. For the counts of six and seven, repeat the actions in count five. For the count of eight, recover sharply to the starting position. You will continue in cadence until all repetitions are completed. The next command is "RECOVER!". On the command of recover sharply return to the position of attention. Are there any questions?

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TURN AND BOUNCE



This is an eight count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE" and "RECOVER!".

This exercise is done at a slow cadence.

The instructor will go in the opposite direction to create a mirror effect.

To halt this exercise, the instructor will elevate his/her voice by saying, 1, 2, 3, 4, 5, 6, AND, "HALT!". The inmates will say AND, "HALT!" with the instructor.

The instructor will call the cadence, inmates will count the repetitions.

TURN AND BOUNCE — STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", spread your feet shoulder width apart. Extend your arms sidward [sic] at shoulder level with palms facing up. Head and hips face the front throughout the exercise. Keep the arms parallel with the deck and knees and elbows locked.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE", and for the count of one, turn sharply to your left as far as possible, recovering slightly. For the counts of two and three, repeat the action for count one. For the count of four, recover sharply to the starting position. For the count of five, turn sharply to your right, recovering slightly. For the counts of six and seven, repeat the count of five. For the count of eight, recover sharply to the starting position. You will continue until all repetitions are completed. On the command "RECOVER", you will quickly move back to the position of attention. Are there any questions?

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TURN AND BEND



This is a four count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE" and "RECOVER".

This exercise is done in a slow cadence.

The instructor [sic] will go in the opposite direction to create a mirror effect.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying 1, 2, AND, "HALT!".

The inmates will say AND, "HALT!" with the instructor.

The instructor will count the cadence, the inmates will count the repetitions.

TURN AND BEND — STARTING POSITION, "MOVE!"

On the command of execution "MOVE!", spread your feet shoulder width apart, extending your arms overhead, keeping your arms straight and palms facing each other.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, turn your trunk to the left and bend forward over the left thigh, trying to touch the ground with your fingertips outside the left foot, keeping your left leg straight. For the count of two, recover to the starting position. For the count of three, turn your trunk to the right and bend forward over the right thigh, trying to touch the ground with your fingertips outside the right foot, keeping your right leg straight. For the count of four, return to the starting position. You will continue in cadence until all repetitions are completed. Are there any questions?

STATIONARY RUN



There are two repetitions of counts for this exercise.

There are several commands for this exercise, which are explained below.

This exercise is done at a fast cadence.

The instructor calls all commands.

STATIONARY RUN — STARTING POSITION, "MOVE!"

On the command of execution "MOVE!", keep your feet at the position of attention, your elbows stay at your side, raise your arms parallel to the deck. Make a fist with your hands, thumbs facing upwards.

ACTION: INCADENCE, [sic] "EXERCISE!"

On the command of execution "EXERCISE", start running in place; lift your left foot first. Follow the instructor's commands; he/she will count two repetitions of the cadence. For example; "1, 2, 3, 4; 1, 2, 3, 4.". The instructor will then give informal commands such as "FOLLOW ME!"; "Run on the toes and balls of the feet, keeping the back straight"; "SPEED IT UP!"; "INCREASE TO A SPRINT!"; "RAISE YOUR KNEES HIGH, LEAN FORWARD AND PUMP YOUR ARMS VIGOROUSLY"; and "SLOW DOWN". To halt this exercise, the instructor will count two repetitions of cadence, "1, 2, 3, 4; 1, 2, AND, HALT!". When counting, the instructor will only count when the left foot strikes the deck.

SQUAT THRUST

This is a four count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE"

This exercise is done at a moderate cadence.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying 1, 2, AND, "HALT!".

The inmates will say AND, "HALT!" with the instructor.

The instructor will count the cadence, inmates will count the repetitions.

SQUAT THRUST — STARTING POSITION, "MOVE!"

The starting position for this exercise is the position of attention.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution "EXERCISE!", and for the count of one, place your hands on the deck approximately 8-10 inches in front of your feet, bending your knees but keeping your back straight. For the count of two, thrust your legs backwards until your body is fully straight from your head to your feet, heels will be together, toes on the deck. For the count of three, return to the position in count one. For the count of four, quickly move back to the starting position. You will continue until all repetitions are completed. Are there any questions?

STRENGTH

Muscular strength is the greatest amount of force a muscle or muscle group can exert in one movement. The human body has over 400 voluntary muscles that move the skeleton. The following strength exercises used at the Quehanna Boot Camp will help strengthen these muscles.

1. PUSH-UPS
2. SIT-UPS
3. LEG LIFTS
4. PULL-UPS
5. KNEE BENDER

PUSH-UPS

This is a four count exercise.

The commands for this exercise are, IN CADENCE, "EXERCISE" and "RECOVER".

This exercise is done at any speed cadence.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying 1, 2, AND, "HALT!".

The inmates will say AND, "HALT!" with the instructor.

The instructor will call the cadence, inmates will count the repetitions.

PUSH-UPS, BY THE NUMBERS — STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", and for the count of one, place your hands on the deck shoulder width apart, bending at the waist. For the count of two, [sic] thrust your legs backwards with your heels together and your toes on the deck. Body should be straight from head to heels.

ACTION — IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, lower your body until the chest is approximately 4-6 inches from the deck. For the count of two, return to the starting position. For the count of three, lower your body until your chest is approximately 4-6 inches off the deck. For the count of four, return to the starting position. You will continue in cadence until all repetitions are completed. The next command you will receive will be "BY THE NUMBERS, RECOVER!". On the command of execution of "RECOVER!", and for the count of one, you will bring your feet back under your body approximately 18 inches from your hands. For the count of two, quickly move back to the position of attention. Are there any questions?

SIT-UPS



STARTING POSITION

This is a two count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE!" and "RECOVER!".

This exercise is done at a slow cadence.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying, "1, 2, AND, HALT!". Inmates will say "AND, HALT!" with the instructor.

The instructor will call the cadence, inmates will count the repetitions.

SIT-UPS: STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", take one thirty inch

step forward with your left foot, place your right hand on the [sic] deck to assist you into the sitting position. Lie flat on the deck, raise your knees so that your feet are flat on the deck close to the buttocks. Cross your right arm over your left arm on your chest. A second inmate can hold your feet.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, raise your upper body until your elbows touch the knees. For the count of two, go back to the starting position. You will continue until all repetitions [sic] are completed. The next command you will receive is "RECOVER!". You will quickly move back to the position of attention. Are there any questions?

LEG LIFTS



FRONT VIEW



SIDE VIEW

This is a four count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE!" and "RECOVER!".

This exercise is done at a slow cadence.

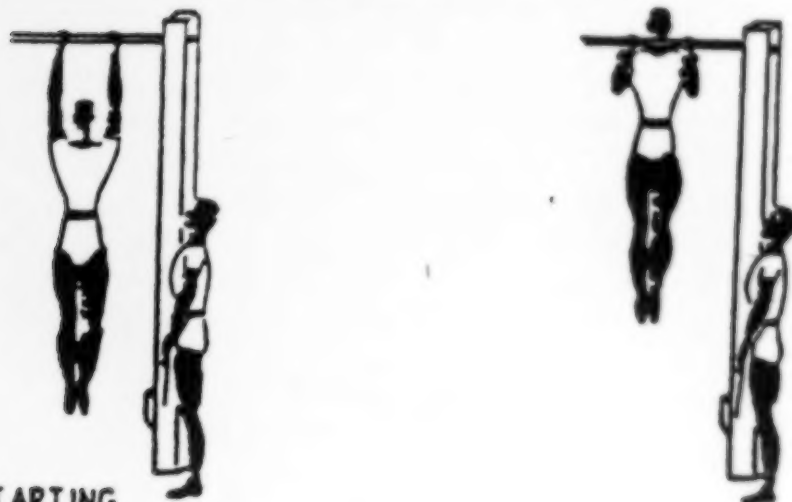
To halt this exercise the instructor will elevate his/her voice on the last repetition by saying, 1, 2, AND, "HALT!". The inmates will say AND, "HALT!" with the instructor. The instructor will call the cadence, the inmates will count the repetitions.

LEG LIFTS — STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", take one step forward with your left foot and place your right hand on the deck to assist you into the sitting position. Lie flat on your back, arms extended to the side, palms flat on the deck. Legs are flat on the deck, heels together.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, raise both legs together off of the deck approximately 6 inches. For the count of two, spread your legs outward more than shoulder width apart, 6 inches off the deck. For the count of three, bring your legs back together 6 inches off of the deck. For the count of four, lower your legs to the starting position. You will continue in cadence until all repetitions are completed. Are there any questions?

PULL-UPS / CHIN-UPS

**STARTING
POSITION**

There are no counts to this exercise.

STARTING POSITION:

The participants may be assisted to the bar by a step up, or by jumping. The hand placement for the pull-up is: Palms facing inward or to the rear. The hand placement for the chin-up is: Palms facing outward or to the front.

NOTE: The spacing distance for both exercises is six inches between the palms.

ACTION:

The bar is grasped either palms facing forward or to the rear, the arms are fully extended, and feet free from the ground. One rep-

etition consists of raising the body with the arms until the chin is above the bar and lowering the body until the arms are extended. Kicking motions are not permitted to complete the repetition.

KNEE BENDER

This is a four count exercise.

The commands for this exercise are IN CADENCE, "EXERCISE!" and "RECOVER!".

This exercise is done at a moderate cadence.

To halt this exercise, the instructor will elevate his/her voice on the last repetition by saying, 1, 2, AND, "HALT!". The inmates will say AND, "HALT!" with the instructor.

The instructor will call the cadence, the inmates will count the repetitions.

KNEE BENDER — STARTING POSITION, "MOVE!"

On the command of execution, "MOVE!", spread your feet approximately shoulder width apart, put your hands on your hips with thumbs in the small of the back and elbows back.

ACTION: IN CADENCE, "EXERCISE!"

On the command of execution, "EXERCISE!", and for the count of one, bend your knees; lean slightly forward at the waist and slide your arms along the outside of the legs until your fingers touch the top of your calves [sic]. For the count of two, recover to the starting position. For the count of three, bend your knees; lean slightly forward at the waist and slide your arms along the outside of your legs until your fingers touch the top of your calves [sic]. For the count of four, return to the starting position. You will continue [sic] in cadence until all repetitions are completed. Upon the command "RECOVER!", you will quickly return to the position of attention. Are there any questions?

RUNNING

Running enables the body to improve the transport of oxygen, which in turn enhances the conditioning of the muscles. The Quehanna Boot Camp program is composed of double-time marching and various types of running.

DOUBLE-TIME MARCHING

Double-time marching is at the rate of 180 steps per minute; each step is approximately 36 inches long. This differs from the Quick Time, which is 120 steps per minute. Runers [sic] should keep in step, placing their feet flat on the ground. However, there should not be a stamping motion; there should be as slight a jolt as possible. Double-time is like a jog; the difference is that in a jog, the feet are lifted off the ground and running motion is smooth. In double-time, the feet skim the ground an [sic] there is no bounce.

WIND SPRINTS

Wind sprints improve caridiorespiratory [sic] endurance and conditions and strengthens the legs. It consists of 40-50 yard sprints at 85-90 percent of maximum effort. This type of running is conducted by squads. Each squad leader places his squad in a file on a flat course. Th [sic] einstructor [sic] gives the command "READY...., GO!" or ready, whistle. On this command, the entire squad will sprint to the finish line and then run back to the starting line behind the other squads.

QUEHANA RUNNING CHANTSMY GRANDMA

My Grandma turned 91, she did her PT just for fun.
My Grandma turned 92, she did her PT better than you.
My Grandma turned 93, she did her PT just like me.
My Grandma turned 94, she ran four miles and then some more.

My Grandma turned 95, she did her PT to stay alive.
My Grandma turned 96, she did her PT just for kicks.
My Grandma turned 97, she up, she died and went to heaven.
She meet [sic] Saint Peter at the Pearly Gates, said St. [sic] Peter
I hope I'm not late.
Saint Peter said with a big ole grin, get down Granny and knock out ten.

Sgt. McMahon, QBC

MICHAEL JACKSON

Michael Jackson came to town, Coco Cola turned him down. Pesi [sic] Cola burned him up, now he's drinking 7-Up.

Sgt. Davies, QBC

DONT [sic] DO DRUGS

I know a homeboy back on the block, his sister's a junkie and he sells rock.

One fatal lesson he never learned, the rock may smoke but he's going to burn.

Liquor and drugs there's just no way, the QBC's the only way.

Captain Griffith, QBC

SISTER KNOWS BEST

I know a girl who lives on a hill, she wouldn't do it but her brother will.

Just what it is that her brother will do, he'll go to bootcamp just like you.

Liquor and drugs there's just know [sic] way, the QBC's the only way.

Captain Griffith, QBC

IN SHAPE

I can run to Rockview just like this, All [sic] the way to Rockview and never quit.

I can run to Huntindon [sic] just like this, All [sic] the way to Huntingdon and never quit.

I can run to Camphill [sic] just like this, All [sic] the way to Camphill [sic] and never quit.

Sgt. Bennett, QBC

CO CADENCE

CO, CO, Don't [sic] arrest me, arrest that homeboy behind the tree.

He smoked the crack, I drank the wine, now he's doing the double-time.

CoI Slippey, QBC

A DAY AT THE QBC

Up in the morning at the break of day, I don't like it — no way!

Push-ups, Sit-ups [sic], two mile run; D and C just for fun.

Marching and drilling everyday [sic]; I can't take it — no way!

Eat my breakfast too damn soon; Hungry [sic] as hell by noon.

CoI Wagner, QBC

LOOK AT ME MA

Mama, Mama can't you see, the QBC is the life for me.

Ain't no drugs or alcohol, just some racks and a dining hall.

CoI Kyle, QBC

THANK GOD FOR THE QBC

Went for a run and what did I see, a big ole rattler lookin' at me.
His body was coiled he was ready to strike, before he could I was outta sight.

Said PT, Saved [sic] ME!

On my run I spotted a bear, but he ran off when he saw my hair.

Said Haircut [sic] Saved [sic] my butt!

On my run I saw Commander Wertz, I said can I please quit this double-time hurts.

He said Bull shit [sic], No [sic] can quit.

Sgt. Bennett, QBC

ADDITIONAL ACTIVITIES

Several activities may be used to add variety to the QBC Fitness Program. Most of these activities may be done on the PT Grinder, but can be moved to softer ground. Exceptions are going to be the Boot Camp Confindece [sic] Course. [sic] Some of the following will be used to put variety into the QBC Fitness Program as the inmates progress.

1. Grass Drills
2. Squad Competitions
3. Obstacle Course

The following pages will give you the guidelines to these additional activities, they are only guidelines and can be used at instructor's will.

GRASS DRILLS

Grass Drills consist of movements that feature rapid changes in the body position. These are vigorous drills that exercise all major muscle groups. Inmates will respond to commands as fast as possible and perform at top speed. Though no cadence is called, inmates continue doing multiple repetitions of each exercise until the next command is given. The purpose of grass drills is to decrease reaction time, develop muscular endurance, increase strength and improve cardio-respiratory [sic] endurance. Since these drills are extremely strenuous, there will be a 10 to 15 minute time limit to these exercises.

A warm-up activity should precede grass drills, and a cool down period should follow them.

To continue with the role model concept of this program, all instructors will do these exercises with the inmates.

The commands peculiar to grass drills are given in rapid succession with out [sic] the usual preparatory commands. To prevent confusion, the instructor should give commands sharply to distinguish them from comments or words of encouragement. as [sic] soon as the inmates are familiar with the drill, they will do all exercises as vigorously and rapidly as they can. Each exercise is done continuously until the next command is given. Anything less than top speed performance is ineffective.

Inmates do not have to come to the position of attention once the drills start. The command "UP" is used to halt the drill for instructions or for rest. At this command, the inmates [sic] will assume a relaxed standing position.

Grass drills can be done in a short period. For example, they may be used when only a few minutes are available to exercise, or they may be combined with another activity. Grass drills are an excellent occasional substitute for running when time is limited.

The following paragraphs explain formations, starting with positions and movements executed in grass drills.

STARTING POSITIONS

The drills start from the "GO" position. Other basic positions are "FRONT", "BACK" and "STOP". (See figure 1-1.)

*GO! Running in place (top speed) on the toes and the balls of the feet with knees raised up high, arms pumping and body bent forward slightly at the waist.

*FRONT! Lying prone with elbows bent (alongside the body) palms flat on the ground directly under the shoulders, legs straight and together and head toward the instructor.

*BACK! Lying flat on the back with arms extended near the sides on the ground with palms facing down, legs straight and together and feet toward the instructor.

*STOP! Assuming the football — lineman stance: feet spread apart and staggered, left arm across left thigh, right arm straight, knuckles on the ground, head up and back parallel to the ground.

To assume the front or back position from the standing, go or stop position, the inmate should change positions vigorously and rapidly. (See figure 1-1)

To change from front to the back position, an inmate should do the following:

1. Take several short steps to the right or left.
2. Lift the arm on the side toward which the feet move.
3. Thrust the legs vigorously to the front.

To change from the back to the front position, an inmate should sit up quickly and place both [sic] hands on the ground to the right or left of the legs. The inmate should then take several short steps to the rear on the side opposite the hands. When the feet are opposite the hands, the legs should be thrust vigorously to the rear and the body lowered to the ground.

BOUNCING BALL From the front position, push-up and support your body on the hands, which are shoulder width apart and the feet together. Keep the back and legs in line and the knees straight. Bounce up and down in a series of short upward springs from the hands, hips and feet simultaneously.

BICYCLE From the back position raise the legs and hips. Keep the elbows on the ground and support the hips with the hands. Move the legs vigorously as if pedaling a bicycle.

KNEE BEND From the stop position, do half knee bends with the feet on line and the hands at the sides. Make sure that the knees do not bend more than 90 degrees.

ROLL RIGHT OR LEFT From the front position continue to roll in the direction commanded until another command is given. Then return to the front position.

ROCKER In the front position, clasp the hands behind the back, arch the body and hold the head back. Start rocking, using the front part of the trunk as a rocker. (The leg extension may be substituted for this exercise.)

BOUNCE AND CLAP HANDS The procedure is the same as for the bouncing ball; However [sic], in this drill, while in the air, clap the hands. (The push-up may be substituted for this exercise).

LEG SPREADER From the back position, raise the legs until the heels are 10 - 12 inches from the ground. Legs remain straight, toes skyward. Spread them apart as far as possible; then put them together. Keep the head off the ground. Place the hands (palm down) at the side. Open and close the legs as fast as possible. (The sit-up may be substituted for this exercise).

FORWARD ROLL For forward rolls from the stop position, place both hands on the ground, tuck the head and roll forward. Keep the head tucked while rolling.

The instructor may use any of the above mentioned [sic] exercises in any order he/she desires. It is very important to keep track of the time when doing these exercises. On the following pages, you will find some examples of how the grass drills can be used.

STARTING POSITIONS FOR GRASS DRILLS



GRASS DRILLS



COOL DOWN

After the activity period, whether it is running, strength training or a combination of these, inmates must cool down properly. The cool down gradually slows down the heart rate after vigorous activity. During exercise, the blood moves faster than usual through [sic] the one way valves of the heart, through the veins and back to the heart by the muscles squeezing action.

After jogging, inmates should walk and stretch for at least 4 minutes. The cool down period should continue until the heart rate returns to normal and profuse sweating stops.

Cool down is a continuation of the training, but at a lower intensity. Quehanna Boot Camp uses the following cool down exercises:

1. Walking/ Quick time marching (2-5 minutes)
2. Neck Stretch
3. Upper Back Stretch
4. Groin Stretch
5. Ham-string Stretch

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JA-54

Army Physical Fitness Test Scorecard*For use of this form, see FM 21-20; the proponent is TRADOC.*

Print Name (Last, First, Middle Initial)

Test One			Test Two		
Date	Grade	Age	Date	Grade	Age
Height	Weight	Go No Go	Height	Weight	Go No Go
Unit	Weather Temp		Unit	Weather Temp	
PU Raw Score	Initials	Points	PU Raw Score	Initials	Points
SU Raw Score	Initials	Points	SU Raw Score	Initials	Points
2M Raw Score	Initials	Points	2M Raw Score	Initials	Points
Alternate Event		Total Points	Alternate Event		Total Points
Time _____ Go/No Go			Time _____ Go/No Go		
APFT OIC/NCOIC Signature and Rank			APFT OIC/NCOIC Signature and Rank		
Comments:			Comments:		

Special Instructions: Use ink.

Legend:**PU — Push-ups****SU — Sit-ups****2M — 2-mile run****APFT — Army Physical Fitness Test**

DA FORM 705, MAY 87

JA-55

Data Required by the Privacy Act of 1974

Title: DA Form 705

Authority: 10 USC 301.2(g)

Principal purpose: record of individual scores on physical fitness events

Mandatory or voluntary disclosure and effect on individual not providing information: mandatory — individuals not providing information cannot be rated/scored.

Social Security Number

Sex

Test Three			Test Four		
Date	Grade	Age	Date	Grade	Age
Height	Weight	Go No Go	Height	Weight	Go No Go
Unit	Weather Temp		Unit	Weather Temp	
PU Raw Score	Initials	Points	PU Raw Score	Initials	Points
SU Raw Score	Initials	Points	SU Raw Score	Initials	Points
2M Raw Score	Initials	Points	2M Raw Score	Initials	Points
Alternate Event		Total Points	Alternate Event		Total Points
Time _____ Go/No Go			Time _____ Go/No Go		
APFT OIC/NCOIC Signature and Rank			APFT OIC/NCOIC Signature and Rank		
Comments:			Comments:		

EDITION OF JUN 86 WILL BE USED UNTIL EXHAUSTED

JA-56

Army Physical Fitness Test Scorecard*For use of this form, see FM 21-20; the proponent is TRADOC.*

Print Name (Last, First, Middle Initial)

Test Five			Test Six		
Date	Grade	Age	Date	Grade	Age
Height	Weight	Go No Go	Height	Weight	Go No Go
Unit	Weather Temp		Unit	Weather Temp	
PU Raw Score	Initials	Points	PU Raw Score	Initials	Points
SU Raw Score	Initials	Points	SU Raw Score	Initials	Points
2M Raw Score	Initials	Points	2M Raw Score	Initials	Points
Alternate Event		Total Points	Alternate Event		Total Points
Time _____ Go/No Go			Time _____ Go No Go		
APFT OIC/NCOIC Signature and Rank			APFT OIC/NCOIC Signature and Rank		
Comments			Comments		

Special Instructions Use ink.

Legend:**PU — Push-ups****SU — Sit-ups****2M — 2-mile run****APFT — Army Physical Fitness Test**

DA FORM 705, MAY 87

JA-57

Data Required by the Privacy Act of 1974

Title DA Form 705

Authority 10 USC 301.2(g)

Principal purpose record of individual
scores on physical fitness eventsMandatory or voluntary disclosure and effect
on individual not providing information:
mandatory — individuals not providing infor-
mation cannot be rated/scored

Social Security Number

Sex

Test Seven			Test Eight		
Date	Grade	Age	Date	Grade	Age
Height	Weight	Go No Go	Height	Weight	Go No Go
Unit	Weather Temp		Unit	Weather Temp	
PU Raw Score	Initials	Points	PU Raw Score	Initials	Points
SU Raw Score	Initials	Points	SU Raw Score	Initials	Points
2M Raw Score	Initials	Points	2M Raw Score	Initials	Points
Alternate Event		Total Points	Alternate Event		Total Points
Time _____ Go/No Go			Time _____ Go/No Go		
APFT OIC/NCOIC Signature and Rank			APFT OIC/NCOIC Signature and Rank		
Comments			Comments		

EDITION OF JUN 86 WILL BE USED UNTIL EXHAUSTED

MALE/FEMALE SIT-UP

Repetitions	AGE GROUP	17-21	22-26	27-31	32-36	37-41	42-46	47-51	52+
92		100							
91		99							
90		98							
89		97							
88		96							
87		95							
86		94							
85		93							
84		92							
83		91							
82		90							
81		89							
80		88							
79		87							
78		86							
77		85							
76		84							
75		83							
74		82							
73		81							
72		80							
71		79							
70		78							
69		77							
68		76							
67		75							
66		74							
65		73							
64		72							
63		71							
62		70							
61		69							
60		68							
59		67							
58		66							
57		65							
56		64							
55		63							
54		62							
53		61							
52		60							
51		59							
50		58							
49		57							

46	56	61	66	70	75	78	81	84	87	88
47	55	60	65	69	74	77	78	80	83	85
48	54	58	64	68	73	76	77	79	82	84
49	52	56	62	66	71	74	75	77	80	83
50	51	54	61	65	70	73	74	76	79	82
51	49	53	60	64	69	72	73	75	78	81
52	48	52	59	63	68	71	72	74	77	80
53	47	51	58	62	67	70	71	73	76	79
54	46	50	57	61	66	69	70	72	75	78
55	45	49	56	60	65	68	69	71	74	77
56	44	48	55	59	64	67	68	70	73	76
57	43	47	54	58	63	66	67	69	72	75
58	42	46	53	57	62	65	66	68	71	74
59	41	45	52	56	61	64	65	67	70	73
60	40	44	51	55	60	63	64	66	69	72
61	39	43	50	54	59	62	63	65	68	71
62	38	42	49	53	58	61	62	64	67	70
63	37	41	48	52	57	60	61	63	66	69
64	36	40	47	51	56	59	60	62	65	68
65	35	39	46	50	55	58	59	61	64	67
66	34	38	45	49	54	57	58	60	63	66
67	33	37	44	48	53	56	57	59	62	65
68	32	36	43	47	52	55	56	58	61	64
69	31	35	42	46	51	54	55	57	60	63
70	30	34	41	45	50	53	54	56	59	62
71	29	33	40	44	49	52	53	55	58	61
72	28	32	39	43	48	51	52	54	57	60
73	27	31	38	42	47	50	51	53	56	59
74	26	30	37	41	46	49	50	52	55	58
75	25	29	36	40	45	48	49	51	54	57
76	24	28	35	39	44	47	48	50	53	56
77	23	27	34	38	43	46	47	49	52	55
78	22	26	33	37	42	45	46	48	51	54
79	21	25	32	36	41	44	45	47	50	53
80	20	24	31	35	40	43	44	46	49	52
81	19	23	30	34	38	42	43	45	48	51
82	18	22	29	33	37	41	42	44	47	50
83	17	21	28	32	36	40	41	43	46	49
84	16	20	27	31	35	39	40	42	45	48
85	15	19	26	30	34	38	39	41	44	47
86	14	18	25	29	33	37	38	40	43	46
87	13	17	24	28	32	36	37	39	42	45
88	12	16	23	27	31	35	36	38	41	44
89	11	15	22	26	30	34	35	37	40	43
90	10	14	21	25	29	33	34	36	39	42
91	9	13	20	24	28	32	33	35	38	41
92	8	12	19	23	27	31	32	34	37	40
93	7	11	18	22	26	30	31	33	36	39
94	6	10	17	21	25	29	30	32	35	38
95	5	9	16	20	24	28	29	31	34	37

SCORING STANDARDS

Scoring standards are used for converting raw scores to point scores after test events are completed.

Repetitions ΔG CRDUE		MALE/FEMALE PUSH-UP						
17 21		22 26	27 31	32 36	37 41	42 46	47 51	52*
82	100							
81	99							
80	98							
79	97							
78	96							
77	95							
76	94							
75	93							
74	92							
73	91							
72	90							
71	89							
70	88							
69	87							
68	86							
67	85							
66	84							
65	83							
64	82							
63	81							
62	80							
61	79							
60	78							
59	77							
58	76							
57	75							
56	74							
55	73							
54	72							
53	71							
52	70							
51	69							
50	68							
49	67							
48	66							

47	55	89	67	91	69	93	74	95	75	99	41	85	100	100	91
46	64	88	66	90	68	92	73	94	74	98	60	84	99	90	8
45	63	87	65	89	67	91	72	93	73	97	79	83	98	89	4
44	62	86	64	88	66	90	71	92	72	96	78	82	97	88	8
43	61	85	63	87	65	89	70	91	71	95	77	81	96	87	4
42	60	84	62	86	64	88	69	90	70	94	76	80	95	86	8
41	59	83	61	85	63	87	68	89	69	93	75	79	94	85	4
40	58	82	60	84	62	86	67	88	68	92	74	78	93	84	8
39	57	81	59	83	61	85	66	87	67	91	73	77	92	83	4
38	56	80	58	82	60	84	65	86	65	89	71	75	91	82	8
37	55	79	57	81	59	83	64	85	64	88	70	74	90	81	4
36	54	78	56	80	58	82	63	84	63	87	69	73	89	80	8
35	53	77	55	79	57	81	62	83	62	86	68	72	88	79	4
34	52	76	54	78	56	80	61	82	61	85	67	71	87	78	8
33	51	75	53	77	55	79	60	81	60	84	66	70	86	77	4
32	50	74	52	76	54	78	59	80	59	83	65	69	85	76	8
31	49	73	51	75	53	77	58	79	58	82	64	68	84	75	4
30	48	72	50	74	52	76	57	78	57	81	63	67	83	74	8
29	47	71	49	73	51	75	56	77	56	80	62	66	82	73	4
28	46	70	48	72	50	74	55	76	55	79	61	65	81	72	8
27	45	69	47	71	49	73	54	75	54	78	60	64	80	71	4
26	44	68	46	70	48	72	53	74	53	77	59	63	79	70	8
25	43	67	45	69	47	71	52	73	52	76	58	62	78	69	4
24	42	66	44	68	46	70	51	72	51	75	57	61	77	68	8
23	41	65	43	67	45	69	50	71	50	74	56	60	76	67	4
22	40	64	42	66	44	68	49	70	49	73	55	59	75	66	8
21	39	63	41	65	43	67	48	69	48	72	54	58	74	65	4
20	38	62	40	64	42	66	47	68	47	71	53	57	73	64	8
19	37	61	39	63	41	65	46	67	46	70	52	56	72	63	4
18	36	60	38	62	40	64	45	66	45	69	51	55	71	62	8
17	35	59	37	61	39	63	44	65	44	68	50	54	70	61	4
16	34	58	36	60	40	64	43	64	43	67	49	53	69	60	8
15	33	57	35	59	39	63	42	63	42	66	48	52	68	59	4
14	32	56	34	58	38	62	41	62	41	65	47	51	67	58	8
13	31	55	33	57	37	61	40	61	40	64	46	50	66	57	4
12	30	54	32	56	36	60	39	60	39	63	45	49	65	56	8
11	29	53	31	55	35	59	38	59	38	62	44	48	64	55	4
10	28	52	30	54	34	58	37	58	37	61	43	47	63	54	8
9	27	51	29	53	33	57	36	57	36	60	42	46	62	53	4
8	26	50	28	52	32	56	35	56	35	59	41	45	61	52	8
7	25	49	27	51	31	55	34	55	34	58	40	44	60	51	4
6	24	48	26	50	30	54	33	54	33	57	39	43	59	50	8
5	23	47	25	49	29	53	32	53	32	56	38	42	58	49	4
4	22	46	24	48	28	52	31	52	31	55	37	41	57	48	8
3	21	45	23	47	27	51	30	51	30	54	36	40	56	47	4
2	20	44	22	46	26	50	29	50	29	53	35	39	55	46	8
1	19	43	21	45	25	49	28	49	28	52	34	38	54	45	4

MALE/FEMALE 2-MILE RUN

Time AGI GROUP	17 21	22 26	27 31	32 36	37 41	42 46	47 51
11 54	100 POINTS						
12 00	99						
12 06	98						
12 12	97						
12 18	96						
12 24	95						
12 30	94						
12 36	93						
12 42	92	100					
12 48	91	99					
12 54	90	98					
13 00	89	97					
13 06	88	96					
13 12	87	95					
13 18	86	94					
13 24	85	93	100				
13 30	84	92	99				
13 36	83	91	98				
13 42	82	90	97				
13 48	81	89	96				
13 54	80	88	95				
14 00	79	87	94				
14 06	78	86	93	100			
14 12	77	85	92	99			
14 18	76	84	91	98			
14 24	75	83	90	97			
14 30	74	82	89	96			
14 36	73	81	88	95			
14 42	72	80	87	94			
14 48	71	79	86	93	100		
14 54	70	78	85	92	99		
		77	84	91	98		

1500	69	99	76	83	90	97	100
1506	68	98	75	82	89	96	100
1512	67	97	74	81	88	95	99
1518	66	96	73	80	87	94	98
1524	65	95	72	79	86	93	97
1530	64	94	71	78	85	92	96
1536	63	93	70	77	84	91	95
1542	62	92	69	76	83	90	94
1548	61	91	68	75	82	89	93
1554	60	90	67	74	81	88	92
1600	59	89	66	73	80	87	91
1606	58	88	65	72	79	86	90
1612	57	87	64	71	78	85	89
1618	56	86	63	70	77	84	88
1624	55	85	62	69	76	83	87
1630	54	84	61	68	75	82	86
1636	53	83	60	67	74	81	85
1642	52	82	59	66	73	80	84
1648	51	81	58	65	72	79	83
1654	50	80	57	64	71	78	82
1700	48	79	56	63	70	77	81
1706	46	78	55	62	69	76	80
1712	44	77	54	61	68	75	79
1718	42	76	53	60	67	74	78
1724	40	75	52	59	66	73	77
1730	38	74	51	58	65	72	76
1736	36	73	50	57	64	71	75
1742	34	72	48	56	63	70	74
1748	32	71	46	55	62	69	73
1754	30	70	44	54	61	68	72
1800	28	69	42	53	60	67	71
1806	26	68	40	52	59	66	70
1812	24	67	38	51	58	65	69
1818	22	66	36	50	57	64	68
1824	20	65	34	48	56	63	67

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MALE/FEMALE 2-MILE RUN

Time	Age Group	17 21	22 26	27 31	32 36	37 41	42 46	47 51
18:30		18	32	46	55	62	66	71
18:36		16	30	44	54	61	65	70
18:42		14	28	42	53	60	64	69
18:48		12	26	40	52	58	63	68
18:54		10	24	38	51	56	62	67
19:00		8	22	36	50	54	61	66
19:06		6	20	34	48	52	60	65
19:12		4	18	32	46	50	58	64
19:18		2	16	30	44	48	56	63
19:24			14	28	42	46	54	62
19:30			12	26	40	44	52	61
19:36			10	24	38	42	50	60
19:42			8	22	36	40	48	58
19:48			6	20	34	38	46	56
19:54			4	18	32	36	44	54
20:00			2	16	30	34	42	52
20:06				14	28	32	40	50
20:12				12	26	30	38	48
20:18				10	24	28	36	46
20:24				8	22	26	34	44
20:30				6	20	24	32	42
20:36				4	18	22	30	40
20:42				2	16	20	28	38
20:48					14	18	26	36
20:54					12	16	24	34
21:00					10	14	22	32
21:06					8	12	20	30
21:12					6	10	18	28
21:18					4	8	16	26
21:24					2	6	14	24
21:30						4	12	22

21:36	16	30	32	70	2	80	10	84	20	89
21:42	14	28	30	69		79	8	83	18	88
21:48	12	26	28	68		78	6	82	16	87
21:54	10	24	26	67		77	4	81	14	86
22:00	8	22	24	66		76	2	80	12	85
22:06	6	20	22	65		75		79	10	84
22:12	4	18	20	64		74		78	8	83
22:18	2	16	18	63		73		77	6	82
22:24		14	16	62		72		76	4	81
22:30		12	14	61		71		75	2	80
22:36		10	12	60		70		74		79
22:42		8	10	59		69		73		78
22:48		6	8	58		68		72		77
22:54		4	6	57		67		71		76
23:00		2	4	56		66		70		75
23:06				55		65		69		74
23:12				54		64		68		73
23:18				53		63		67		72
23:24				52		62		66		71
23:30				51		61		65		70
23:36				50		60		64		69
23:42				48		58		63		68
23:48				46		56		62		67
23:54				44		54		61		66
24:00				42		52		60		65
24:06				40		50		58		64
24:12				38		48		56		63
24:18				36		46		54		62
24:24				34		44		52		61
24:30				32		42		50		60
24:36				30		40		48		58
24:42				28		38		46		56
24:48				26		36		44		54
24:54				24		34		42		52
25:00				22		32		40		50
25:06				20		30		38		48

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QUEHANNA BOOT CAMP LESSON PLAN

COURSE TITLE: Physical Fitness Training

PREPARED BY: Sgt. McMahon & Sgt. Mattive

DATE: 3-03-92

MALE/FEMALE 2-MILE RUN						
Time	401 1.00	17 21	22 26	27 31	32 36	37 41
25:12	46	36	28	18	28	46
25:18	44	34	26	16	26	44
25:24	42	32	24	14	24	42
25:30	40	30	22	12	22	40
25:36	38	28	20	10	20	38
25:42	36	26	18	8	18	36
25:48	34	24	16	6	16	34
25:54	32	22	14	4	14	32
26:00	30	20	12	2	12	30
26:06	28	18	10		10	28
26:12	26	16	8		8	26
26:18	24	14	6		6	24
26:24	22	12	4		4	22
26:30	20	10	2		2	20
26:36	18	8				18
26:42	16	6				16
26:48	14	4				14
26:54	12	2				12
27:00	10					10
27:06	8					8
27:12	6					6
27:18	4					4
27:24	2					2
27:30						
27:36						
27:42						
27:48						
27:54						

★ U.S. Government Printing Office: 1987-183-799/69092

TIME FRAME:

1 hour

TARGET POPULATION:

Correctional Staff

PERFORMANCE
OBJECTIVES:

To perform basic structure
and guidelines and to lead
an effective physical
training program

EVALUATION
PROCEDURES:

Supervisor's Evaluation

REVIEWED/APPROVED: _____

LESSON PLAN OUTLINE

- I. Introduction
- II. Formations
- III. Warm-up (stretching)
- IV. Cardiovascular
- V. Strength
- VI. Running
- VII. Cool Down Period

Lesson Plan:
Cover Page 2

TRAINING METHODS:

Classroom Environment/Demonstration

TRANSPARENCIES/
VISUAL AIDS:

Projector

HANDOUTS/STUDENT
MATERIALS:EQUIPMENT
NEEDED:

P.T. Uniform

REFERENCES:

U.S. Army
FM 21-20

COURSE: Physical Fitness
TrainingPAGE: 1

NOTES AND METHODOLOGY	CONTENT
I. Introduction	<p>A. This program develops both the upper and lower body, plus cardiorespiratory endurance. Ref: United States Army Master Physical Fitness, FM21-20</p> <p>B. The program is divided in six separate phases:</p> <ol style="list-style-type: none"> 1. Formation 2. Warm-up 3. Cardiovascular 4. Strength 5. Running 6. Cool-down <p>C. Physical training develops both mind and body. A well organized [sic] training program will instill discipline, motivation and team work. A physical training program must be well planned and organized. It must have <u>good</u> supervision. Instructors <u>must</u> be able to lead physical training with proper commands and knowledge of the exercise.</p> <p>D. Physical training is conducted daily to motivate inmates. This practice will instill a high degree of self-confidence and discipline. This practice will set a positive tone for the day's activities.</p>
II. Form for P.T.	<p>A. The Extended Rectangular Formation is used with platoons or companies. It can be formed when platoons are in a line formation (side by side) or column formation (behind each other).</p>

- B. The instructor always should be centered on the formation when extended. This can be done by having the platoon(s) fall into the far left of the instructor when facing the formation. When the formation is extended, it will then be centered on the instructor.
- C. The following commands are used:
1. Extend to The Left, March — At this command, inmates in the right flank file stand fast with their arms extended to the sides at shoulder level. All other inmates turn to the left and double-time forward. After taking a specific number of steps, all inmates face the front; each has both arms extended to the sides at shoulder level. The distance between fingertips is about 12 inches, and dress is right.
 2. Arms Downward, Move — At this command, the inmates lower their arms smartly to their sides, to the position of attention.
 3. Left Face — Inmates execute the left-face movement.
 4. Extend to the Left, March — At this command inmates in the right flank file stand fast with their arms extended to the sides. All other inmates turn to the left and double-time forward. Spacing is same as above, and dress is right.

5. Arms Downward, Move — Inmates lower their arms smartly to their sides, to the position of attention.
6. Right Face — Inmates execute the right-face movement.
7. From Front to Rear, Count Off — At this command, the leading inmate in each column turns his or her head to the right rear, calls off "one," and faces the front. Successive inmates in each column call off in turn, "two," "three," "four," "five," and so on.
8. Even Numbers to the Left, Uncover At this command, all even-numbered inmates jump to the left squarely in the center of the interval, bringing their feet together. The unit is now ready for stretching and warm-up exercises.
9. Assemble to the Right, March — At this command, all inmates double-time to their original positions in column or line formation.

III. Warm-up (Stretching)

- A. Proper warm-up is needed before each physical training session. This helps to prepare the body for vigorous exercise, and will help prevent injuries. Stretching is a major part of the warm-up procedures.
- B. The following stretching exercises will be used at QBC:
 1. Neck stretch *See fig. [sic] #2
 2. One-arm side stretch *See Fig. #1
 3. Hamstring stretch *See Fig. #3 & 14
 4. Ankle stretch *See Fig. #4
 5. Groin stretch *See Fig. #5
 6. Lower back stretch *See Fig. #6
 7. Long sit *See Fig. #7
 8. Single/double knee to chest *Fig. 8 [sic]

IV. Cardiovascular

- A. The following cardiovascular exercises will be used at QBC:
 1. Side-straddle hop *See Fig. #9
 2. Side bender *See Fig. #10
 3. Knee bender *See Fig. #11
 4. Turn and bounce *See Fig. #12
 5. Turn and bend *See Fig. #13
 6. Jogging in place *See Fig. #14

V. Strength

- A. The following strength exercises will be used at QBC:
 1. Push-ups *See Fig. #15
 2. Sit-ups *See Fig. #16
 3. Leg lifts

Physical Fitness

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VI. Running

A. The following procedure will be used to take the QBC staff on a run from the PT formation:

1. Assemble to the right, march
2. March the inmates into position for the run
3. Give the command "Double time, march"
4. Call running cadence throughout the run
5. When run is complete, call "Quick time, march"

B. Running the inmates

1. Keep the inmates in formation
2. The pace should be kept so that the formation stays together
3. Ensure that the formation stays right and covered
4. Cool inmates down with a small march after run

VII. Cool Down Period

A. Cool down is an important part of physical training. It allows the heart rate to gradually slow down.

B. During exercise period the blood moves faster than normal. If the proper cool down period is not sufficient, this may result in heart and/or brain damage.

C. Cool down is a continuation of the training but at a lower intensity.

Physical Fitness

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D. Some of the following are good exercises for cooling down:

1. Walking/quick time marching, 2-5 minutes
2. Neck stretch
3. Low back stretch
4. Single knee to chest
5. Long sit

E. The cool down should continue until the heart rate is below 100 beats per minute or until heavy sweating stops. Apply 4 to 6 minutes in length.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)	
Plaintiff,)	
vs.)	
THE COMMONWEALTH OF	)	Civil Action No. 94-2180
PENNSYLVANIA DEPARTMENT	)	Judge Alan N. Bloch/
OF CORRECTIONS,	)	Magistrate Judge Sensenich
JOSEPH D. LEHMAN,	)	Re: Doc. # 19
JEFFREY A. BEARD, Ph.D.,)	
JEFFREY K. DITTY, DOES)	
NUMBER 1 THROUGH 20,)	
INCLUSIVE,)	
Defendants)	

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that this action be transferred to the United States District Court for the Middle District of Pennsylvania.

II. REPORT

Plaintiff, Ronald R. Yeskey, presently an inmate at the State Correctional Institution at Greensburg, commenced this action pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Named as defendants are the Commonwealth of Pennsylvania Department of Corrections and its former Commissioner Joseph D. Lehman, Superintendent Jeffrey A. Beard of the State Correctional Institution at Camp Hill, Jeffrey K. Ditty, Director of the Central Diagnostic and Classification Center of the State Correctional Institution at Camp Hill, and unidentified John Doe defendants. Plaintiff complains that defendants violated

his federally secured rights under the ADA as well as his constitutional rights under the Fifth, Eighth and Fourteenth Amendments, and Article I, section 1 of the Pennsylvania Constitution. He seeks a declaratory judgment, money damages, injunctive relief, costs of prosecuting this claim and any other relief deemed appropriate by this court.

Plaintiff alleges that in May 1994, he was sentenced to serve a term of eighteen to thirty-six months with the recommendation of the sentencing judge that he be placed in the Department of Corrections' Motivational Boot Camp program. He contends that while confined at the Classification and Diagnostic Center at the State Correctional Institution at Camp Hill ("SCI-Camp Hill") on July 1, 1994, he was advised that he was not eligible for the Motivation Boot Camp program because of his history of hypertension. Although he made repeated requests for placement in the program, these requests were denied. Further, he was allegedly denied admission to any type of alternative program.

Plaintiff argues that the Motivational Boot Camp is a service, program, or activity of a public entity within the meaning of the ADA, and that he was denied admission solely because of a disability. He argues that the defendants failed to use criteria for eligibility to their program which provides a qualified individual with a disability an equal opportunity for participation in the boot camp program. Plaintiff complains that this denied him equal protection of the laws and violated the ADA. Additionally, he complains that defendants acted with deliberate indifference subjecting him to cruel and unusual punishment under the Eighth Amendment.

The defendants have filed a motion to dismiss, or in the alternative, a motion to transfer this action. In this motion, defendants argue that venue is improper in this district because all of the identified defendants reside in Harrisburg, Pennsylvania, and because SCI-Camp Hill, where the alleged misconduct occurred — is located in the Middle District of Pennsylvania. This court must first determine whether venue is proper in this district before considering whether plaintiff has alleged a claim under Rule 12(b)(6). Madara v. Hall, 916 F.2d 1510, 1514 n.1 (11th Cir. 1990).

At the time this action was filed, plaintiff was confined at the State Correctional Institution at Greensburg. He argues that venue is proper in this district because the harm he suffered resulting from the defendants' alleged misconduct is to be confined in a penal facility located in this district.

Venue for actions commenced under 42 U.S.C. § 1983 and the ADA where there is no diversity of citizenship is governed by 28 U.S.C. § 1391(b). Gilbert v. Texas Mental Health and Mental Retardation, 888 F. Supp. 775, 776 (N.D. Tx. 1995). Section 1391(b) provides that a lawsuit may be filed in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The purpose of venue statutes is "to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." LeRoy v. Great Western United Corporation, 443 U.S. 173, 184 (1979). In LeRoy, the Court first confronted a multi-party/multi-district venue problem and interpreted the "claim arose" provision of 28 U.S.C. § 1391 (b) as follows:

Without deciding whether this language adopts the occasionally fictive assumption that a claim may arise in only one district, it is absolutely clear that Congress did not intend to . . . give [plaintiff] an unfettered choice among a host of different districts.

Id. at 184-85. The Court then balanced all the factors presented by both parties and found that "the bulk of the relevant evidence and witnesses" favored venue in one district. Id. at 186. This district court has interpreted the test in LeRoy as a "weight of the contacts" which would favor one venue over another. Seilon Inc. v. Lamb, 559 F. Supp. 563 (W.D. Pa. 1983).

The "claim arose" provision found in the venue statute and used in LeRoy was amended in 1990. The statute now states that venue is proper where "a substantial part of the events or omis-

sions giving rise to the claim occurred." This amendment permits venue in more than one district provided that each has a substantial relationship to the action. Cottman Transmission Sys. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994).

After the amended section was enacted, the United States District Court for the Eastern District of Pennsylvania continued to use the "weight of the contacts" test to determine venue under section 1391. Eastman v. Initial Investments, Inc., 827 F. Supp. 336, 338 (E.D. Pa. 1993). Under the "weight of the contacts" test "venue would be proper in the district having the most significant ties to the claim." Broadcasting Company of the Carolinas v. Flair Broadcasting Corporation, 892 F.2d 372, 376 (4th Cir. 1989).

Plaintiff argues that his incarceration within this district is a sufficient basis for this court to find that venue is proper here. In Flanagan v. Shively, 783 F.Supp. 922 (M.D. Pa.), aff'd, 980 F.2d 722 (3d Cir. 1992), the only link the inmate established to the Middle District was his incarceration in that district. He did not allege any events or acts by defendants occurring within that district. The court found that plaintiff's incarceration within the district was insufficient to justify venue under section 1391(e)(2). Id. at 935. Thus, the court found that the inmate had failed to establish venue.

The basis of plaintiff's claim is that defendants denied him admission to a motivational boot camp which had been recommended by his sentencing judge because he suffered from hypertension. The decision to deny plaintiff admission was made by defendants in the Harrisburg area. Additionally, plaintiff has alleged that the criteria established by the Department of Corrections and its commissioner and used for admission was not fair. Again, this agency and the commissioner are not located in this district. For purposes of venue, the United States District Court for the Eastern District of Pennsylvania has held that "a state official's residence is located at the state capitol, even where branch offices of the state official's department are maintained in other parts of the state." Wilson v. Pennsylvania State Police, 1995 WL 129202, at *1 (E.D. Pa. Mar. 24, 1995) (citations omitted). Thus, the commissioner's residence is also located in the Middle District of Pennsylvania. Plaintiff's only basis for com-

mencing this action here is due to his present incarceration in this district. This is not a sufficient basis for venue. The substantial portions of the events giving rise to plaintiff's claim occurred in the Middle District of Pennsylvania. Under the "weight of the contacts" test, venue is proper in the Middle District and not this district.

When venue is improper, as in this lawsuit, the Court may, in the interest of justice, transfer the case to a district court in which it could have been brought. 28 U.S.C. § 1406(a). Under the facts set forth in the complaint, this lawsuit could have been brought in the United States District Court for the Middle District of Pennsylvania.

Pursuant to 28 U.S.C. § 1406 (a), the Court should transfer this lawsuit to the United State [sic] District Court for the Middle District of Pennsylvania.

In accordance with the Magistrates Act, 28 U.S.C. § 636 (b)(1)(B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

/s/ Ila Jeanne Sensenich

ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: October 18, 1995

cc: The Honorable Alan N. Bloch
United States District Judge

L. Abraham Smith, Esquire
P.O. Box 1644
Greensburg, PA 15601-7644

Gloria A. Tischuk
Deputy Attorney General
4th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)
	Plaintiff)
	) Civil Action No. 94-2180
vs.	) Judge Alan N. Bloch/
	) Magistrate Judge Sensenich
THE COMMONWEALTH OF)
PENNSYLVANIA DEPARTMENT OF	) Re: Doc. # 19
CORRECTIONS,)
JOSEPH D. LEHMAN,)
JEFFREY A. BEARD, Ph.D.,)
JEFFREY K. DITTY,)
DOES NUMBER 1 THROUGH 20,)
INCLUSIVE,)
	Defendants)

MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on December 21, 1994, and was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on October 19, 1995, recommended that this action be transferred to the United States District Court for the Middle District of Pennsylvania. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff by delivery to counsel for plaintiff, L. Abraham Smith, Esquire, and on defendants. No objections have been filed. After review of the pleadings and documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 9th day of November, 1995;

IT IS HEREBY ORDERED that this action is transferred to the United States District Court for the Middle District of Pennsylvania.

The report and recommendation of Magistrate Judge Sensenich, dated October 18, 1995, is adopted as the opinion of the court.

/s/ Alan N. Bloch

Alan N. Bloch

United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

L. Abraham Smith, Esquire
P.O. Box 1644
Greensburg, PA 15601-7644

Gloria A. Tischuk
Deputy Attorney General
4th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RONALD R. YESKEY,

Plaintiff :

: CIVIL ACTION

: NO. 1:95-2125

v.

: (CALDWELL, J.)

: (DURKIN, M.J.)

COMMONWEALTH OF PA, et al.,

Defendants :

REPORT AND RECOMMENDATION

This case is before the court on the defendants' motion to dismiss the plaintiff's complaint. (Doc. No. 1).

By way of background, the plaintiff, an inmate at the State Correctional Institution, Greensburg, Pa, originally filed this civil rights action pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. in the Western District of Pennsylvania on December 21, 1994. By order of the same date, the plaintiff was permitted to proceed in forma pauperis and process was issued.

On February 7, 1995, the plaintiff requested an entry of default against the defendants for their failure to file an answer to the complaint. On March 7, 1995, the defendants filed a motion to set aside the default judgment. On April 7, 1995, the plaintiff consented to the defendants' motion to set aside default judgment and by order dated April 19, 1995, the entry of default was set aside.

On April 24, 1995, the defendants filed a motion to dismiss or, in the alternative, to transfer the case. After being granted an enlargement of time, on May 25, 1995, the defendants filed a brief in support of their motion to dismiss or transfer. On June 20, 1995, the plaintiff filed a brief in opposition to the defendants' motion to dismiss or transfer.

On October 19, 1995, a magistrate judge in the Western District issued a report in which only the motion to transfer was

addressed, and recommended that the defendants' motion to transfer the case to the United States District Court for the Middle District of Pennsylvania be granted. In that report, the motion to dismiss was not addressed. By order dated November 9, 1995, the magistrate judge's report and recommendation was adopted. On December 13, 1995, the case was transferred to the Middle District of Pennsylvania where it was filed on December 14, 1995. On December 15, 1995, the case was received in the magistrate judge's office with the defendants' April 24, 1995, motion to dismiss still pending. Thus, before the court is the defendants' motion to dismiss.

The plaintiff alleges that in May 1994, he was sentenced to serve a term of eighteen to thirty-six months with the recommendation of the sentencing judge that he be placed in the Department of Corrections' Motivational Boot Camp program. He contends that on July 1, 1994, while confined at the Classification and Diagnostic Center at the State Correctional Institution at Camp Hill, (SCI-Camp Hill), he was advised that he was not eligible for the Motivation Boot Camp program because of his history of hypertension. Although he made repeated requests for placement in the program, these requests were denied. Further, he was allegedly denied admission to any type of alternative program. (Doc. No. 1). The plaintiff argues that the Motivational Boot Camp is a service, program, or activity of a public entity within the meaning of the ADA, and that he was denied admission solely because of a disability. He argues that the defendants failed to use criteria for eligibility to their program which provides a qualified individual with a disability an equal opportunity for participation in the boot camp program. The plaintiff complains that this denied him equal protection of the laws and violated the ADA. Additionally, he complains that defendants acted with deliberate indifference subjecting him to cruel and unusual punishment under the Eighth Amendment. (Id.).

The plaintiff seeks damages as well as an injunction releasing him from incarceration at some unidentified "chronological point when plaintiff would have been released had he been admitted to and successfully completed the Boot Camp Program" as well as "submit plans" to accomplish this release and pay attorney fees, costs and expenses". (Id.).

By statute, the motivational boot camp is

"A program in which eligible inmates participate for a period of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intense regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, ventilation therapy, continuing education, vocational training and prerelease counseling. [sic]

61 Pa.C.S.A. §§ 1121-1129; § 1123 (1994 Supp.).

An eligible inmate may make application to the motivational boot camp colcotion [sic] committee for permission to participate in the motivational boot camp. *Id.* at § 1126(a). If the selection committee determines that an inmate's participation in the program is consistent with the safety of the community, the welfare of the applicant, the programmatic objectives and the rules and regulations of the department, the committee shall forward the application to the secretary or his designee for approval or disapproval. *Id.* at § 1126(b). However, satisfying the above qualifications to participate does not mean the inmates will automatically be permitted to participate in the program. *Id.* at § 1126(d).

With respect to the plaintiff's claim under the American [sic] with Disabilities Act, (ADA), that the Motivational Boot Camp is a service, program, or activity of a public entity within the meaning of the ADA, and that he was denied admission solely because of a disability, Title II of the ADA, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132.

The regulations implementing the ADA define a "qualified individual with a disability" as:

"An individual with a disability who, with or without reasonable modifications to rules, policies or practices, . . . meets the essential eligibility requirements for the . . . participation in programs or activities provided by a public entity."

28 C.F.R. § 35.104 (1993).

The ADA seeks "to assure even handed [sic] treatment and the opportunity for [disabled] individuals to participate in and benefit from programs [receiving financial assistance]. [sic] Southeastern Community College v. Davis, 442 U.S. 397 (1979). The "evenhanded treatment" requirement does not, however, impose an affirmative obligation on public entities to expand existing programs but only that disabled individuals receive the same treatment as those who are not disabled. P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990).

In an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must allege and prove that the defendants deprived him of a right secured by the Constitution and laws of the United States. Maine v. Thiboutot, 448 U.S. 1 (1980); Baker v. McCollan, 443 U.S. 137 (1979). The plaintiff claims that the Motivational Boot Camp is a service, program, or activity of a public entity within the meaning of the ADA, and that he was denied admission solely because he is disabled.

However, whether or not the plaintiff is a qualified person with a disability pursuant to the ADA is of no moment, since it is well settled that a state prisoner, whether disabled, or not, does not have a protected liberty interest in matters of classification or particular custody status, and none is provided by the ADA or federal law. Hewitt v. Helms, 459 U.S. 460 (1983); Montanye v. Haymes, 427 U.S. 236, 242 (1976); Stephany v. Wagner, 835 F. 2d 197 (3d Cir. 1987); Lull v. Arroyo, 785 F. Supp. 508, 509-10 (E.D. Pa. 1991) (holding that pre-release programs in Pennsylvania penal institutions do not create expectations or entitlements amounting to a "liberty" interest for due process purposes); see also Wright v. Cuyler, 517 F. Supp. 637 (E.D. Pa. 1981); Reider v. Commonwealth of Pennsylvania, 502 A.2d 272 (1985). Moreover, an inquiry by this Court into matters of prison administration, such as classification or custody status, would necessarily interfere with the administration's right to police its penal system. These administration [sic] determinations have consistently and correctly been left to the prison management's sound discretion.

Specifically, with respect to the boot camp, the statutory provisions which govern admission to the boot camp grant unqualified discretion to the Department of Corrections classification staff as they consider candidates. Courts may interfere "only

when the deprivations of prison confinement impose conditions of such onerous burdens as to be of constitutional dimensions." McNeil v. Latney, 382 F. Supp. 161, 162 (E.D. Va. 1974), quoting Breeden v. Jackson, 457 F.2d 578, 580 (4th Cir. 1972); Pope v. Williams, 426 F. Supp. 279 (E.D. Pa. 1971). Thus, "as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye, 427 U.S. at 242.

The refusal to allow the plaintiff into the motivational boot camp program fails to rise to the level of an "onerous burden" such that it is of constitutional dimensions. The Act, itself, unequivocally provides that participation in the program is not dictated and that "satisfying the above qualifications to participate does not mean the inmates will automatically be permitted to participate in the program." 61 Pa.C.S.A. § 1126(d). Thus, even if the plaintiff had not been disqualified due to his medical condition, he would not be assured that he would participate.

Thus, since the plaintiff has not been deprived of a right, privilege or immunity secured by the Constitution or laws of the United States, he has failed to state a claim, see Maine v. Thiboutot, 448 U.S. 1 (1980) and the complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

To the extent that the plaintiff may be attempting to pursue an equal protection claim asserting that he has been unconstitutionally discriminated against, his pleading is lacking in important ways. As the case law interpreting this constitutional guarantee reflects, in order to present a claim of this type, a complaint must assert that a plaintiff, who is a member of a traditionally protected class, has been the object of intentional discrimination motivated by his being a member of that class and that, as a result of this discrimination, he has been treated differently than others who are similarly situated but who are not members of the class. See, e.g., Washington v. Davis, 426 U.S. 229 (1976).

The plaintiff's complaint does not do this. First, it does not indicate that he is a member of any recognized "protected class" for equal protection purposes. But even if this were not the case, it does not show the requisite intentional discrimination associ-

ated with class membership since the decision that the plaintiff could not engage in the rigorous physical activity required of boot camp participants was a rational and medically based decision, as opposed to the critical element, intentional discrimination, required to state an Equal Protection Claim. McNabola v. Chicago Transit Auth., 10 F.3d 501, 513 (7th Cir. 1993).

Finally, with respect to the plaintiff's claim that his denial of entry into the boot camp violated his Eighth Amendment right to be free from cruel and unusual punishment, not every harsh and unpleasant condition experienced by a prisoner gives rise to and [sic] Eighth Amendment claim. Rather, as the Supreme Court observed, it is now a "settled rule" that it is "the unnecessary and wanton infliction of pain. . . [which] constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995 (1992), quoting Ingraham v. Wright, 430 U.S. 651 (1977).

In order to establish the unnecessary and wanton infliction of pain, an inmate must establish both: (a) an objective determination that the actions or conditions at issue are significantly egregious to rise to the level of an Eighth Amendment violation, and (b) a subjective determination that the defendants acted with a culpable state of mind. Hudson, *supra*. Generally, the subjective determination is judged by a standard of "deliberate indifference." Wilson v. Seiter, 501 U.S. 294 (1991).

While the plaintiff claims that his Eighth Amendment rights were violated when he was refused entry into the boot camp program, he has not alleged any facts describing inhumane conditions or that he suffered unnecessary or wanton infliction of pain. The complaint contains no facts which set forth conditions sufficiently egregious to rise to the level of an Eighth Amendment violation. In addition, the plaintiff fails to allege that any of the individual defendants were deliberately indifferent. Thus, the plaintiff has failed to state an Eighth Amendment claim.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED
THAT the defendants' motion to dismiss, (Doc. No. 1)
be granted.

/s/ Raymond J. Durkin

RAYMOND J. DURKIN

United States Magistrate Judge

Dated: January 22, 1996

JA-90

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY, :
Plaintiff :
: CIVIL ACTION NO. 1:95-2125
: (CALDWELL, J.)
v. : (DURKIN, M.J.)
: COMMONWEALTH OF PA, et al., :
Defendants :

NOTICE

FILED
SCRANTON
JAN 23 1996

TO: L. Abraham Smith, Esquire
P.O. Box 1644
Greensburg, PA 15601-7644

PER SIG.
DEPUTY CLERK

Gloria A. Tischuk, Deputy Attorney General
OFFICE OF ATTORNEY GENERAL
4th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

NOTICE IS HEREBY GIVEN that the undersigned has entered the following: **Report and Recommendation of Magistrate Judge Durkin dated 01/22/96.**

Any party may obtain a review of the magistrate judge's above proposed determination pursuant to Rule 72.31, M.D.PA, which provides: **72.31 Review of Case-Dispositive Motions and Prisoner Litigation - 28 U.S.C. Sec. 636(b)(1)(B).**

Any party may object to a magistrate judge's proposed findings, recommendations, or report, under subsections 72.4, .5, and .6 of these rules, supra, within ten (10) days after being served with a copy thereof. Such party shall file with the Clerk of Court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed

JA-91

findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Rule 72.30 shall apply. A judge shall make a de novo determination of these portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.

/s/ Raymond J. Durkin
RAYMOND J. DURKIN
United States Magistrate Judge

Dated: January 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)	
	Plaintiff,)
	)	CIVIL ACTION NO.
	)	1:95-2125
vs.	)	(CALDWELL, J.)
)	
COMMONWEALTH OF)	
PENNSYLVANIA, <u>et al.</u> ,)	
Defendants	)	(DURKIN, M.J.)

**PLAINTIFF'S STATEMENT OF OBJECTIONS TO
MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION PURSUANT TO
RULE 72.31, M.D.Pa.**

Plaintiff, Ronald R. Yeskey, by and through his attorney, L. Abraham Smith, Esquire, brings this Statement of Objections to the Magistrate Judge's Report and Recommendation dated January 22, 1996, which recommended that the defendants' motion to dismiss be granted.

I. The report and recommendation mischaracterizes and impermissibly commingles the clearly separate and distinct elements of a claim pursuant to the Americans with Disabilities Act (42 U.S.C. §12101, et seq.) and those of a claim under the Civil Rights Act (42 U.S.C. §1983).

a.) In order for a state prisoner to state a claim pursuant to the ADA, he need only demonstrate that he was denied access to a service, program or activity of a public entity; he need not allege that he had a constitutional right to participate in the program in question.

b.) In order for a state prisoner to state a claim pursuant to the Section 1983 of the Civil Rights Act (42 U.S.C. §1983), it is sufficient to state that the plaintiff's rights established by the ADA were violated under color of state law.

Respectfully submitted,

DATED: February 6, 1996

/s/ L. Abraham Smith

L. Abraham Smith, Esquire
Attorney for Plaintiff.

Pa. I.D. #69020

P.O. Box 1644

Greensburg, PA 15601-7644

(412) 423-8614

JA-94

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,)
Plaintiff,)
) CIVIL ACTION NO.
) 1:95-2125
vs.) (CALDWELL, J.)
)
COMMONWEALTH OF)
PENNSYLVANIA, et al.,)
Defendants) (DURKIN, M.J.)

CERTIFICATE OF SERVICE

I, **L. ABRAHAM SMITH**, Esquire, hereby certify that on February 6, 1996, I caused to be served a true and correct copy of the foregoing document entitled **Plaintiff's Statement of Objections to Magistrate Judge's Report and Recommendation Pursuant to Rule 72.31, M.D.Pa.** by depositing same in the United States Mail, first-class postage prepaid to the following:

R. Douglas Sherman, Esquire
Deputy Attorney General
Office of the Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120

/s/ L. Abraham Smith

L. Abraham Smith, Esquire
Attorney for Plaintiff

DATE: February 6, 1996

JA-95

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY, :
Plaintiff :
:
vs. : CIVIL ACTION
:
COMMONWEALTH OF : NO. 1: CV-95-2125
:
PENNSYLVANIA, et al., :
Defendants :

MEMORANDUM

I. Introduction and Background.

The plaintiff, Ronald R. Yeskey, an inmate at SCI-Greensburg, Pennsylvania, has filed objections to the report of the magistrate judge which recommended that the defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) be granted. The named defendants are the Pennsylvania Department of Corrections, Joseph D. Lehman, the Department's Commissioner, Jeffrey A. Beard, the Superintendent at SCI-Camp Hill, Pennsylvania, and Jeffrey K. Ditty, the Director of the Central Diagnostic and Classification Center at Camp Hill. (John Doe defendants one through twenty have also been sued.)

The plaintiff filed this action alleging that the refusal to allow him into a prison boot camp program because of high blood pressure violated his rights under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165; his fourteenth amendment right to equal protection; his eighth amendment right (as guaranteed under the fourteenth amendment) to be free from cruel and unusual punishment; and his right to due process as guaranteed under Article I, § 1 of the Pennsylvania Constitution. The plaintiff invokes 42 U.S.C. § 1983 in connection with his federal claims. He seeks damages and declaratory and injunctive relief, including an injunction requiring the defendant to release

the plaintiff from confinement on the date he would have been released if he had been allowed into the boot camp program.

Because we are dealing with a motion to dismiss, we must accept as true the factual allegations in the complaint and construe any inferences to be drawn from them in the plaintiff's favor. See *Kost v. Kozakiewicz*, 1 F.3d 176 (3d Cir. 1993). With this standard in mind, we set forth the background to this litigation, as the plaintiff alleges it.

In May 1994, the plaintiff was sentenced in state court after a guilty plea to eighteen to thirty-six months imprisonment. (Complaint, ¶ 9). The sentencing court recommended his placement in the state's boot camp program which would have allowed him to be released on parole if he successfully completed the six-month program. (*Id.*, ¶ 10). On July 1, 1994, while the plaintiff was housed at SCI-Camp Hill awaiting classification, he was refused entry into the boot camp program "due to a medical history of hypertension (on medication)." (*Id.*, ¶ 11). He was also refused entry into "any alternative program offering to disabled persons . . . the same benefits as the Motivational Boot Camp Program." (*Id.*, ¶ 12). He then filed suit, setting forth the causes of action noted above.¹

II. Procedural Background.

The defendants moved to dismiss all of the claims. In regard to the ADA, they made two arguments. First, the plaintiff had no right under state law to admission to the program so even if he had not been denied entrance on the basis of his high blood pressure, the plaintiff cannot establish that he would have been admitted to the program in any event. Second, the ADA does not require accommodation that would destroy the essential nature of a program. Since rigorous physical activity is essential to the boot camp program, plaintiff cannot be accommodated since his hypertension prevents him from being physically active. In regard to the equal protection claim, they argued that the decision to exclude him was a rational one based on his condition. In regard to relief under section 1983, they argued that the Department

¹ The case was filed in the Western District of Pennsylvania but was transferred here on motion of the defendants.

could not be sued because the eleventh amendment bars suit against the state and because the Department is not a "person" (using the language of the section) who can be sued under it. Finally, in regard to the state constitutional claim, they argued that we should not retain jurisdiction once the federal claims were gone and that, in any event, state law immunized all of the defendants from this claim.

In his report the magistrate judge recommended that the motion be granted. Noting that admission to the boot camp was discretionary with Department officials, he disposed of the ADA claim as follows:

[W]hether [sic] or not the plaintiff is a qualified person with a disability pursuant to the ADA is of no moment, since it is well settled that a state prisoner, whether disabled, or not, does not have a protected liberty interest in matters of classification or particular custody status, and none is provided by the ADA or federal law. [citations omitted]. Moreover, an inquiry by this Court into matters of prison administration, such as classification or custody status would necessarily interfere with the administration's right to police its penal system. These administration (sic) determinations have consistently and correctly been left to the prison management's sound discretion.

(magistrate judge's report at pps. 5-6) (brackets added). The magistrate judge then found the equal protection claim deficient by reasoning that: (1) disabled persons are not a class protected by the clause; and (2) the defendants had not intentionally discriminated because they did not refuse him entrance on the basis of his membership in a disfavored group but because of his high blood pressure. The magistrate judge next concluded that the eighth amendment claim was invalid because the eighth amendment only protects against the unnecessary and wanton infliction of pain and refusal of entry into the program does not satisfy this standard. The magistrate judge did not address the supplemental state constitutional claim.

The plaintiff then filed his objections which concentrate on the substance of his ADA claim. First, the plaintiff contends that the magistrate judge erred in dismissing the ADA claim on the basis that he cannot assert a constitutional right to participation in

the boot camp program. Second, he objects that the magistrate judge erred in requiring a constitutional violation for a section 1983 claim because a violation of a federal statute, here the ADA, is all that is necessary.

In opposing the objections, the defendants argue for the first time that there is no ADA claim because the ADA does not apply to state prisons, relying on cases decided ~~after~~ the briefing of the motion to dismiss. They also contend that the section 1983 claim must fail because that claim requires either a federal constitutional or statutory violation and the plaintiff cannot establish either kind of violation here.

III. Discussion.

We will deal first with the defendants' threshold argument that the ADA does not apply to state prisons. The argument is based on Little v. Lycoming County, 912 F. Supp. 809 (M.D. Pa. 1996), a case decided by another judge of this court, and Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), cert. denied sub nom. Torcasio v. Angelone, ____ U.S. ____, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996). We need only discuss Torcasio since Little simply adopts its reasoning.

It will be helpful to preface our discussion with the pertinent sections of Title II of the ADA. Section 12132 prohibits discrimination against the disabled and provides as follows:

Subject to the provisions of this subchapter [Title II], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (brackets added).

Section 12131(1), the definitional section for Title II, defines a "public entity" as follows:

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government;

42 U.S.C. § 12131(1)(A) and (B)[.]

In Torcasio, the Fourth Circuit stated that section 12131(1) did not cover state prisons. It therefore held on the issue before it, whether Virginia prison officials were entitled to qualified immunity, that the plaintiff prisoner's claim under Title II of the ADA was barred by this defense. In the Fourth Circuit's perception, section 12131(1)'s language, "when viewed in isolation, appears all-encompassing," 57 F.3d at 1344, but was actually too "broad" and "non-specific" to be able to say that it was "clearly establishe[d]" that the ADA applied to state prisons. Id. at 1346 (brackets added). Hence, the defendants could not be subjected to liability since qualified immunity protected them against all claims based on a violation of a federal right except those rights that were clearly established. Id. at 1343.

Although decided in the context of qualified immunity, Torcasio is relevant here because the court essentially reasoned that the ADA does not apply to state prisons. See Little, *supra*, (applying Torcasio in dismissing an ADA claim on the merits); Staples v. Virginia Department of Corrections, 904 F. Supp. 487, 490 n.1 (Mag. Judge E.D. Va. 1995) (relying on Torcasio in dismissing the ADA claim against one defendant and commenting that "with its ruling . . . the Fourth Circuit has all but held that, *per se*, the ADA does not apply to state prison facilities").

Despite the plaintiff's citation to other cases that have applied the ADA to state prisons, we have decided to follow Torcasio and Little. Based on this decision, we need not examine the plaintiff's objections.

We will issue an appropriate order.

/s/ William W. Caldwell

William W. Caldwell

United States District Judge

Date: April 9, 1996

JA-100

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,

Plaintiff :

vs. :

COMMONWEALTH OF
PENNSYLVANIA, et al.,

Defendants :

CIVIL ACTION
NO. 1: CV-95-2125

ORDER

AND NOW, this 9th day of April, 1996, upon consideration of the report of the magistrate judge, dated January 23, 1996, and the objections filed, and upon independent review of the record, it is ordered that:

1. The defendants' motion to dismiss is granted.
2. The plaintiff's federal claims are dismissed and his state constitutional claim is dismissed without prejudice to its filing in an appropriate state court.
3. The Clerk of Court shall close this file.

/s/ William W. Caldwell

William W. Caldwell
United States District Judge

JA-101

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL DIVISION

RONALD R. YESKEY,

Plaintiff,

vs.

THE COMMONWEALTH OF
PENNSYLVANIA DEPARTMENT
OF CORRECTIONS,
JOSEPH D. LEHMAN,
JEFFREY A. BEARD, Ph.D.,
JEFFREY K. DITTY, DOES
NUMBER 1 THROUGH 20,
INCLUSIVE,

Defendants.

CIVIL ACTION NO.
1:95-CV-2125

NOTICE OF APPEAL

Notice is hereby given that Ronald R. Yeskey, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from an order granting defendants' motion to dismiss entered in this action on the 9th day of April, 1996.

Respectfully submitted,

DATED: 5/6/96

/s/ L. Abraham Smith

L. Abraham Smith, Esquire
Attorney for Plaintiff
Pa. I.D. #69020
P.O. Box 1644
Greensburg, PA 15601-7644
(412) 423-8614

JA-102

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL DIVISION

RONALD R. YESKEY,)	
Plaintiff,)	
)	
vs.)	
)	
THE COMMONWEALTH OF)	
PENNSYLVANIA DEPARTMENT)	
OF CORRECTIONS,	)	CIVIL ACTION NO.
JOSEPH D. LEHMAN,	)	1:95-CV-2125
JEFFREY A. BEARD, Ph.D.,)	
JEFFREY K. DITTY, DOES)	
NUMBER 1 THROUGH 20,)	
INCLUSIVE,)	
Defendants.)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing
Notice of Appeal was served upon the following as attorney for all
defendants via first-class mail, postage prepaid on May 6, 1996:

R. Douglas Sherman, Esquire
Office of the Attorney General
15th Flr., Strawberry Square
Harrisburg, PA 17120

/s/ L. Abraham Smith

L. Abraham Smith, Esquire
Attorney for Plaintiff
Pa. I.D. #69020
P.O. Box 1644
Greensburg, PA 15601-7644
(412) 423-8614

JA-103

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7292

RONALD R. YESKEY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN;
JEFFREY A. BEARD, PH.D.; JEFFREY K. DITTY;
DOES NUMBER 1 THROUGH 20, INCLUSIVE

BRIEF OF APPELLEES

Appeal of the Order entered April 9, 1996
in the United States District Court for
the Middle District of Pennsylvania
at Docket No. 1: CV-95-2125

THOMAS W. CORBETT, JR.
Attorney General

BY: R. DOUGLAS SHERMAN

Deputy Attorney General
CALVIN R. KOONS
Senior Deputy Attorney General
JOHN G. KNORR, III
Chief Deputy Attorney General

Office of Attorney General -
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Date: **August 1, 1996**

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STATEMENT OF JURISDICTION

This is a civil action brought by a state prisoner pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et seq. and 42 U.S.C. §1983 over which the district court had subject matter jurisdiction by virtue of 28 U.S.C. §§1331 and 1343.

This appeal is from a final order, over which this Court has jurisdiction by virtue of 28 U.S.C. § 1291. The district court's judgment was entered on April 9, 1996 and the notice of appeal was filed on May 7, 1996.

STATEMENT OF THE ISSUES PRESENTED

Whether the Americans with Disabilities Act is inapplicable to inmates incarcerated in a state prison?

This issue was raised before the district court during briefing on Yeskey's objections to the Report and Recommendation of the Magistrate Judge which recommended that the complaint be dismissed. The scope of review is plenary as to the district court's choice, interpretation and application of controlling legal precepts. *Silverman v. Eastrich Multiple Investor fund* [sic], 51 F.3d 28 (3d Cir. 1995); *Moore v. Tartler*, 986 F. 2d 682, 685 (3d Cir. 1993); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir. 1990).

STATEMENT OF THE CASE

This action alleged that state officials discriminated against an inmate by refusing to assign him to a particular state prison on account of his disability. The appellant, plaintiff in the district court, is Ronald R. Yeskey. Yeskey claimed that the Pennsylvania Department of Corrections did not place him in its motivational boot camp as the trial judge recommended, but declared him medically ineligible based upon his history of hypertension. Yeskey claimed the refusal to place him in the boot camp violated his rights under the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. and violated his right to equal protection actionable pursuant to 42 U.S.C. §1983 and also violated rights under the Pennsylvania Constitution.

Appellees, defendants in the district court, are the Commonwealth of Pennsylvania, Department of Corrections; former Commissioner of Corrections Joseph Lehman; former Superintendent of the State Correctional Institution at Camp Hill Jeffrey A. Beard; and Director of the Central Diagnostic and Classification Center Jeffrey K. Ditty.¹

Yeskey filed this action in December 1994 in the Western District of Pennsylvania, from which it was transferred upon the defendants' motion to dismiss and transfer to the Middle District of Pennsylvania. The Magistrate Judge then issued a Report and Recommendation addressing the merits of the complaint, and recommended that the complaint be dismissed for failure to state a claim upon which relief could be granted on January 23, 1996.

Yeskey filed objections to the Report and Recommendation² to which the defendants responded. The District Court held that the ADA does not apply to state prisons. In reaching this conclusion, the court relied upon the reasoning of the Fourth Circuit Court of Appeals in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), which held that Title II of the ADA was too broad and non-specific to enable the Court to conclude that Congress intended the statute to apply to prisons[.] See App. A-33 - A-35 (Memorandum at pp. 5-7).³

This appeal followed.

STATEMENT OF FACTS

In May 1994, Yeskey was sentenced in state court to a sentence of eighteen to thirty-six months incarceration. App. A-11 (Complaint, ¶9). The sentencing judge recommended that Yeskey be placed in the Department of Corrections' Motivational Boot Camp⁴. App. A-11 (Complaint, ¶10).

¹ Yeskey also named twenty "Does" as defendants. They were never served with process and are not parties to this appeal.

² The objections only addressed the propriety of dismissing the claim under the Americans with Disabilities Act claim [sic] and did not address the Magistrate Judge's recommended disposition of the other claims. Nor has Yeskey challenged those claims here on appeal.

³ Yeskey has attached his appendix to the Brief for Appellant.

⁴ The Motivational Boot Camp Act, 61 P.S. §1121 et seq. established a "motivational boot camp" to which certain inmates may be assigned to serve

In July 1994, while being housed in the State Correctional Institution at Camp Hill's Central Diagnostic and Classification Center, Yeskey was told that he was ineligible for participation in the Motivational Boot Camp program due to a medical history of hypertension. App. A-11 (Complaint, ¶11). The Correctional officials [sic] have not reconsidered their decision regarding Yeskey and have not established any alternative programs offering disabled persons like Yeskey the same benefits as the Motivational Boot Camp. App. A-11 (Complaint, ¶11).

STATEMENT OF RELATED CASES

This case has not previously been before the Court, and there are no pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

Although the Americans with Disabilities Act (ADA) is a broad statute, it does not by its terms apply to prisons and decisions of daily prison administration--areas routinely recognized within the basic core functions of the State and areas in which the Courts have been loathe to intrude for reasons of federal/state comity as well as the recognition that courts are not the appropriate mechanism for administering prisons. As such, intrusions into prison administration should not be lightly entered absent express congressional authorization to do so. No such express authorization exists in the ADA.

Further, the stated purposes of the Act would not be served by applying it to prisons. The act focuses on the provision of public services by public entities to qualified individuals. The forced incarceration of convicted criminals in a very restricted and non-public place does not fit within the purpose or definition of the ADA. Instead, the ADA contemplates application to services and

their sentence by the Department of Corrections for a period of six months. The nature of the boot camp provides rigorous physical activity, intensive regimentation and discipline, work on public projects and other treatment. 61 P.S. §1123. Pursuant to statute, placement of inmates in the boot camp is discretionary with no inmate having a right to such placement. 61 P.S. §1126(d). Upon successful completion of the six month incarceration, the inmate is released on parole for intensive supervision as determined by the Pennsylvania Board of Probation and Parole. 61 P.S. §1127.

programs held open to the public as well as to the employment of free individuals in the public sector.

Given the absence of express statutory authority to apply the ADA to prisons and the lack of reliable evidence of Congress' intent that the ADA apply [sic] to prisons, the Court should hold that ADA [sic] does not apply to decisions of prison administration such as presented here.

ARGUMENT

THE AMERICANS WITH DISABILITIES ACT IS INAPPLICABLE TO INMATES INCARCERATED IN A STATE PRISON.

The district court, relying on the Fourth Circuit's decision in Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), cert. denied sub nom. Torcasio v. Angelone, ___ U.S. ___, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996)⁵, held that the ADA does not apply to claims brought by a state prisoner based upon the prison's programs. App. A-34 - A-35. On appeal, Yeskey presents three arguments. First, that the district court should not have interpreted the ADA at all because it is unambiguous and should be afforded its plain meaning. See Appellant's Brief at pp. 13-16. Second, he claims that because the State's eleventh amendment immunity has been abrogated in suits brought under the ADA, it is improper to balance state and federal interests in interpreting the ADA. See Appellant's Brief at pp. 17-19. Finally, Yeskey argues that federal regulations and various publications related to the ADA supports a conclusion that the ADA applies to State prisons. See Appellant's Brief at pp. 20-23. All of Yeskey's arguments are without merit.

A. Congress did not intend the ADA to apply to prisons.

Through enactment of the ADA, Congress sought to eliminate discrimination against those with disabilities in three specific situations: in employment, (Title I, 42 U.S.C. §12111); in the

⁵ The Court in Torcasio arrived at this conclusion in the context of determining a defense of qualified immunity. Its decision with respect to the ADA is applicable here though.

provision of public services, (Title II, 42 U.S.C. §12131); and in the operation of places of public accommodation, (Title III, 42 U.S.C. §12181). Congress did not state in the Act that it was applicable to state prisons or the decisions of prison administrators.⁶ Instead, the Act is silent on this matter.

A number of courts have recently considered this issue, holding that the ADA does not apply to the incarceration of inmates. The common starting point of each of these cases is the recognition that if Congress seeks to alter the usual constitutional balance between the federal and state governments, it must make its intent to do so unmistakably clear. Torcasio v. Murray, 57 F.3d at 1344, citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984); and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This requirement assures that the legislature has in fact considered and decided the critical issue of the balance of interests. Torcasio, 57 F.3d at 1344, citing United States v. [sic] Bass, 404 U.S. 336 (1971). A court should not override the federal-state balance absent a finding of clear congressional intent to do so. Torcasio, 57 F.3d at 1344-5, citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).⁷

The text of Title II, "Public Services", of the ADA is admittedly broad, but nowhere in the language of the Act or its legislative history is there an express mention of state prisons:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

⁶ Federal regulations do not provide any evidence of Congressional intent with respect to applying the ADA to prison management decisions. Although regulations implementing the ADA do mention "correctional institutions" in one brief place, at 28 C.F.R. §35.190 which designates the Department of Justice as the agency to implement the ADA relating to law enforcement, administration of justice, courts and correctional institutions, the regulation does not specify how the ADA is to be administered or the breadth of the ADA application in those areas.

⁷ The legislative history also does not express an intent to apply the ADA to state prisons.

The statute defines a "public entity" as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government, . . ." 42 U.S.C. §12131 (1) (A) (B). Further, a "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. §12131(2).

Broad language should not necessarily be construed to be all-encompassing where it undermines other legal precepts and upsets the normal balance of powers. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 245-6 (1985) (remedy provided in Rehabilitation Act against "any recipient of Federal assistance" does not mean a state even though states are recipients of federal assistance); Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 283-5 (1973) (Fair Labor Standards Act language applying to "employees of a State" did not mean state employee could sue the state for violation). Rather, congressional intent must be interpreted in light of the contemporary legal context. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 71 (1992).

This is a case in which "there is no surer way to misread [a] document than to read it literally." Guisseppi v. Walling, 144 F. 2d 608, 624 (2d Cir. 1944). The inclusion of state prisons and their management into the coverage of the ADA would be at great odds with the universal recognition that the administration and management of State prisons is a basic state function entwined within the State's criminal justice system, Torcasio, 57 F.3d at 1345, citing Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973), and Procunier v. Martinez, 416 U.S. 396, 412 (1974); Little v. Lycoming County, 912 F.Supp. 809 (M.D. Pa. 1996), and one which the Supreme Court has routinely advised Courts to refrain from entering. See Torcasio, 57 F.3d at 1346 and cases cited therein.

B. Prisons are not "public entities" which provide "public services."

Besides the basic intrusion upon the State sovereign function of prison administration which application of the ADA would create, application as advanced by Yeskey runs counter to the purposes of Title II of the ADA, which Yeskey claims applies to this case. That Title clearly indicates Congress' intent that it apply to the provision of "public services" to "qualified individuals". The services provided by prisons are to the general public. It hardly can be said that involuntarily locking a criminal up in a prison of the State's choosing, compelling a prisoner to work or move at designated times, forcing confinement in sparsely furnished surroundings, or mandating specific treatment for inmates are public services to the prisoner. Such a construction of the ADA is absurd.

Prison administrators are responsible for internal order, discipline, and security of those put in their custody. Prisons generally do not provide "services," "programs," or "activities" as those terms are ordinarily understood. Torcasio, 57 F.3d at 1345, citing Procunier v. Martinez, *supra*, 416 U.S. at 404; Little v. Lycoming County, *supra*. Prisons are not places in which the public may normally access nor in which the public may apply for or take advantage of services, and should therefore not be considered public entities.⁸ Prisons are restrictive, non-public places where convicted criminals are sent--not by choice or by volunteering, but by uninvited order of a court.⁹

C. Inmates are not "qualified" individuals.

Additionally, an inmate with a disability does not readily meet the definition of a "qualified individual" under the Act. A

⁸ Appellees do not argue that all aspects of a correctional facility are immune from application of the ADA. Certainly, the ADA would be applicable to employment of staff and access to buildings open to the public such as general administration areas or visiting areas. Rather, appellees contest only application of the ADA to the management of prisons in terms of routine daily decisions of inmate custody and control, programming, security, order and discipline.

⁹ The Motivational Boot Camp is no different. The Boot Camp is simply an alternative form of prison designed by the Legislature for certain classes of criminals. See 61 P.S. §§1122-1126.

prisoner does not normally have "occasion to 'meet [] the essential eligibility requirements' for receipt of or participation in the services, programs, or activities of a public entity. The terms 'eligible' and 'participate' imply voluntariness on the part of the applicant who seeks a benefit from the State; they do not bring to mind prisoners who are being held against their will." Torcasio, 57 F.3d at 1347; Bryant v. Madigan, 84 F.3d 246, 248-9 (7th Cir. 1996) (questioning whether Congress could have actually intended disabled prisoners to be mainstreamed into the highly restricted environment of prison); and Gorman v. Barch, 925 F.Supp. 653, 655-6 (M.D. Mo. 1996).

There are no aspects of the ADA which lend it to ready application to prison management decisions. This is equally true whether the decision is one concerning inmate employment, Pierce v. King, 918 F.Supp. 932 (E.D. N.C. 1996); an inmate's cell dimensions, Torcasio, *supra*; or the placement of an inmate in a particular prison deemed appropriate by prison administrators following classification processes as found here.¹⁰

In an analogous context, courts have refused to infer from language as broad as that in the ADA, congressional intent that the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq.* apply to inmate employees. The FLSA, like the ADA, contains broad, sweeping language and imposes minimum wage requirements while defining employees as "any individual employed by an employer", 29 U.S.C. §203 (e) (1) and employers as "any person acting . . . in the interest of an employer in relation to an employee and includes a public agency". 29 U.S.C. §203 (d). "Employ" is defined as "to suffer or permit to work". 29 U.S.C.

¹⁰ At least one Court, in Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994), has held that "the Act's statutory rights in a prison setting [is] equivalent to [the standard for] the review of constitutional rights in a prison setting." 39 F.3d at 1447. The refusal to place Yeskey in a particular prison setting which he desires does not implicate any constitutional right. Olim v. Wakinekona, 461 U.S. 238, 245 (1982); Moody v. Daggett, 429 U.S. [sic] 78, 88 (1976); Meachum v. Fano, 427 U.S. 215, 224-5 (1976). Neither Yeskey, nor any other prisoner, should enjoy any greater right to placement in a prison of his choice than he would have if he were not disabled. Yet application of the ADA would provide disabled prisoners a greater right than they could ever possess were they not disabled and thereby would severely intrude upon ordinary decisions of prison management.

§203(g). Further, although the FLSA excludes certain categories of persons from application, it does not specifically mention prisoners. See [sic] 29 U.S.C. §213(a).

In each case involving claims that prisoners employed by a prison receive minimum wage, the courts have acknowledged the great intrusion upon a State sovereign function which application of the FLSA to prison labor would create and refused to intrude absent express congressional direction to do so. See Harker v. State Use Industries, 990 F. 2d 131 (4th Cir.), cert. denied ____ U.S. ____, 114 S. Ct. 238 (1993); Gilbreath v. Cutter Biological Inc., 931 F. 2d 1320, 1325 (9th Cir. 1991); Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992); and Miller v. Dukakis, 961 F.2d 7, 8 (1st Cir. 1992). Indeed, a congressional act should not be construed in a way which would result in absurdity and impute an intent not expressly intended.

The result should be the same here. The plain meaning of a statute should not be automatically followed where it "will produce a result demonstrably at odds with the intention of the drafters." United States v. Ron Pair Enterprises, 489 U.S. 235, 242 (1989). A thing may be within the letter of the statute and yet not within its spirit nor within the intention of its makers. United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 201 (1979).

Application of the ADA to internal prison management would place nearly every aspect of prison management into the court's hands for scrutiny simply because an inmate has a disability. See Pierce v. King, 918 F.Supp. 932, 941 (E.D. N.C. 1996). For instance, if the ADA applies to routine prison decisions, it is not unfathomable that courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments and to interfere with security procedures. These are affects [sic] which certainly should not be ascribed to Congressional intent without Congress expressly saying so. As the Court in Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994), stated, "[t]he Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." Id. at 1446-7.

Yeskey does not cite to a single case holding that the ADA does apply in these circumstances.¹¹ Instead, Yeskey argues that Torcasio's analysis of balancing federal and state interests when construing and applying the statute is erroneous. Yeskey claims that because Torcasio is premised upon a number of cases involving the Eleventh Amendment immunity of the States, and because the ADA has abrogated the Eleventh Amendment, the concerns of State interests and comity are no longer important. See Brief for Appellant, pp. 17-19. Yeskey cites no authority for this proposition. Nor are appellees aware of any. That immunity may have been abrogated for the States under the ADA does not defeat or limit the analysis of the State's substantial interest in prison administration nor the discussion of whether prisons are public entities providing public services or whether inmates are qualified individuals. Congress' intent to abrogate the State's immunity for claims involving public services by public entities to qualified individuals does not provide reason to believe Congress also intended to trample the long-established rights of States in areas not specified, nor in traditional non-public areas simply because the State may have some involvement with it.

Finally, Yeskey cites to publications of the National Institute of Justice which he claims outline the "obligation of state correctional agencies to assist disabled inmates" and claim that these publications evince pronouncements of the Department of Justice. See Brief for Appellant, pp. 20-23. Yeskey has attempted to provide this Court with a copy of one of these publications under cover letter dated July 15, 1993.¹² This Court returned the document to Yeskey as an improper submission under Rule 28(j). Appellees address the publications below in the event Yeskey may

¹¹ Although there are several cases holding application of the ADA appropriate, none is binding precedent on this Court and, as noted in Torcasio, supra, and Little v. Lycoming County, 912 F.Supp. 809 (M.D. Pa. 1996), they either do not squarely address the issue or give it a superficial analysis which is not persuasive in light of the concerns expressed above.

¹² The submission of the document or reliance on it is improper since it is not a statute or regulation, was not part of the record submitted before the district court, and is not a supplemental authority as contemplated in Appellate Rule 28(j).

seek leave to file an addendum to submit the documents as referenced in the Court's July 18, 1996 letter to Yeskey's counsel.

The publications referenced are not regulations and are not entitled to any deference as Yeskey contends. In fact, the only such publication submitted to the Court (under the separate cover letter dated July 15, 1996), specifically provides that the "points of view in this document are those of the authors and do not necessarily represent the official position of the U. S. Department of Justice." See page 7 of July 15, 1996 submission. Thus, Yeskey has misrepresented the nature of the documents and has provided no authoritative reason upon which to believe that Congress intended the ADA to apply to the management of prisons and the prisoners incarcerated there.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

BY: /s/ R. Douglas Sherman

R. DOUGLAS SHERMAN
Deputy Attorney General

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

DATE: AUGUST 1, 1996

JA-120

CERTIFICATE OF BAR MEMBERSHIP

I, **R. DOUGLAS SHERMAN**, hereby certify that I am a member in good standing of the Bar of this court[.]

/s/ R. Douglas Sherman

R. DOUGLAS SHERMAN

Deputy Attorney General

JA-121

CERTIFICATE OF SERVICE

I, **R. DOUGLAS SHERMAN**, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on **August 1, 1996**, I cause [sic] to be served two true and correct copies of the foregoing document entitled **Brief of Appellees** by depositing two copies in the united [sic] States Mail, first-class, postage prepaid to the following:

L. Abraham Smith, Esq.

P. O. Box 1644

Greensburg, PA 15601-7644

/s/ R. Douglas Sherman

R. DOUGLAS SHERMAN

Deputy Attorney General

DATED: **AUGUST 1, 1996**

JA-122

Filed July 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7292

RONALD R. YESKEY,
APPELLANT

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF
CORRECTIONS; JOSEPH D. LEHMAN; JEFFREY A.
BEARD, PH.D.; JEFFREY K. DITTY; DOES NUMBER 1
THROUGH 20, INCLUSIVE,

APPELLEES

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-02125)

Argued: January 31, 1997

Before: BECKER, ROTH, *Circuit Judges*, and
BARRY, *District Judge*.*

(Filed July 10, 1997)

L. ABRAHAM SMITH, ESQUIRE
(ARGUED)
P.O. Box 1644
Greensburg, PA 15601

Attorney for Appellant

*Honorable Maryanne Trump Barry, United States District Judge for
the District of New Jersey, sitting by designation.

JA-123

THOMAS W. CORBETT, JR.
Attorney General
R. DOUGLAS SHERMAN (ARGUED)
Deputy Attorney General
CALVIN R. KOONS
Senior Deputy Attorney General
JOHN G. KNORR, III
Chief Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Attorneys for Appellees

OPINION OF THE COURT

BECKER, *Circuit Judge*.

Ronald R. Yeskey is a Pennsylvania prison inmate who was denied admission to the Pennsylvania Department of Correction's Motivational Boot Camp program because of a history of hypertension, despite the recommendation of the sentencing judge that he be placed therein.¹ Yeskey brought suit in the district court under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, alleging that his exclusion from the program violated that enactment.²

The district court dismissed Yeskey's complaint, Fed. R.

1. The Motivational Boot Camp Act, 61 P.S. § 1121 *et seq.*, established a "motivational boot camp" to which certain inmates may be assigned by the Department of Corrections to serve their sentences for a period of six months. The boot camp provides rigorous physical activity, intensive regimentation and discipline, work on public projects, and other treatment. *Id.* § 1123. Pursuant to statute, placement of inmates in the boot camp is discretionary, and, as such, no inmate has a right to such placement. *Id.* § 1126(d). Upon successful completion of the six months incarceration, the inmate is released on parole for intensive supervision as determined by the Pennsylvania Board of Probation and Parole. *Id.* § 1127.

2. Yeskey also asserted claims under 42 U.S.C. § 1983 and state law.

Civ. P. 12(b)(6), holding that the ADA is inapplicable to state prisons. The question of the applicability of the ADA to prisons is an important one, especially in view of the increased number of inmates, including many older, hearing-impaired, and HIV-positive inmates, in the nation's jails. See generally Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49, 56-63 (1996). For the reasons that follow, we reverse.³

I.

Because this appeal turns on statutory construction, we begin with the text of the relevant statute, or more precisely, statutes. Although Yeskey only invoked the ADA, our discussion necessarily involves Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). Section 504, the first federal statute to provide broad prohibitions against discrimination on the basis of disability, applies only to programs and activities receiving federal financial assistance. Title II of the ADA, the broader statute, enacted in 1990, extends these protections and prohibitions to all state and local government programs and activities, regardless of whether they receive federal financial assistance. Congress has directed that Title II of the ADA be interpreted in a manner consistent with Section 504, 42 U.S.C. § 12134(b), 12201(a),⁴ and all the leading cases take up the statutes together, as will we.

The substantive provisions of the statutes are similar. Section 504 provides in pertinent part:

3. By the time this case was listed for submission in this Court, only a short time remained on Yeskey's sentence, and we have unfortunately been unable to dispose of it until now. He may have been released (the parties have not informed us on this point). However, Yeskey's complaint included a claim for damages, and hence the case is not moot. We also note that, since boot camp placement commences contemporaneous with the execution of sentence, it would probably be nigh impossible to test improper exclusion from the boot camp program in federal court before the six month placement expires, likely creating a situation capable of repetition yet evading review, which excuses mootness.

4. See generally Robbins, *supra*, at 73-76.

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency[.]

29 U.S.C. § 794(a).

Title II of the ADA provides in pertinent part:

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the Services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The statutory definition of "[p]rogram or activity" in Section 504 indicates that the terms were intended to be all-encompassing. They include "all of the operations of — (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b) (emphasis added). It is hard to imagine how state correctional programs would not fall within this broad definition.

Moreover, a word in a statute "must be given its 'ordinary or natural' meaning," see *Bailey v. United States*, 116 S. Ct. 501, 506 (1995), and the ordinary meanings of "activity" and "program" clearly encompass those that take place in prisons. "Activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of "an organizational unit for performing a specific function." *Webster's Third New International Dictionary* 22 (1986). "Program" is defined as "a plan of procedure; a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. Certainly, operating a prison facility falls within the "duties or functions" of local government authorities. Moreover, Title II's definition of a "public entity" clearly encompasses a state or local correctional facility or authority: "any department, agency,

... or other instrumentality of a State or States or local government[.]” 42 U.S.C. § 12131(1)(B) (emphasis added).

This conclusion is bolstered by the Department of Justice (DOJ) regulations implementing both Section 504 and Title II of the ADA. These regulations were expressly authorized by Congress, 29 U.S.C. § 794(a); 42 U.S.C. §§ 12134(a), 12206, and, in view of Congress’ delegation, the DOJ’s regulations should be accorded “controlling weight unless [they are] ‘arbitrary, capricious, or manifestly contrary to the statute.’” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418 (1995). The same is true of the preamble or commentary accompanying the regulations since both are part of the DOJ’s official interpretation of the legislation. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994). DOJ interprets both Section 504 and Title II of the ADA to apply to correctional facilities.

The regulations promulgated by DOJ to enforce Section 504 define the kinds of programs and benefits that should be afforded to individuals with disabilities on a nondiscriminatory basis. The regulations define “program” to mean “the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, e.g., a police department or department of corrections.” 28 C.F.R. § 42.540(h) (1996) (emphasis added). The term “[b]enefit” includes “provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct).” *Id.* § 42.540(j) (emphasis added). The appendix to the regulations, attached to the Final Rule (45 Fed. Reg. 37620, 37630 (1980)), makes clear that services and programs provided by detention and correctional agencies and facilities are covered by Section 504. This coverage is broad, and includes “jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities.” *Id.*

The appendix further provides that those facilities designated for use by persons with disabilities are “required to make structural modifications to accommodate detainees or prisoners in wheelchairs.” *Id.* The DOJ regulations

applicable to federally conducted programs also make it clear that institutions administered by the Federal Bureau of Prisons are subject to Section 504. See 28 C.F.R. § 39.170(d)(1)(II) (Section 504 complaint procedure for inmates of federal penal institutions); *id.* pt. 39, Editorial Note, at 675 (Section 504 regulations requiring nondiscrimination in programs or activities of the Department of Justice apply to the Federal Bureau of Prisons); *id.* at 676 (federally conducted program is “anything a Federal agency does”).

The regulations promulgated under Title II of the ADA afford similar protections to persons with disabilities who are incarcerated in prisons, or otherwise institutionalized by the state or its instrumentalities, regardless of the public institution’s receipt of federal financial assistance. The regulations state that the statute’s coverage extends to “all services, programs, and activities provided or made available by public entities.” *Id.* § 35.102(a). This broad language is intended to “apply[] to anything a public entity does.” *Id.* pt. 35, app. A, subpt. A at 456. As part of its regulatory obligations under Title II, the DOJ is designated as the agency responsible for coordinating the compliance activities of public entities that administer “[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions.” *Id.* § 35.190(b)(6). The preamble to the ADA regulations also refers explicitly to prisons, stating that, where an individual with disabilities “is an inmate of a custodial or correctional institution,” the entity is required to provide “assistance in toileting, eating, or dressing to [that] individual[.]” *Id.* pt. 35, app. A at 468.⁵

5. Moreover, the DOJ Title II Technical Assistance Manual specifically lists “jails and prisons” as types of facilities that, if constructed or altered after the effective date of the ADA (January 26, 1992), must be designed and constructed so that they are readily accessible to and usable by individuals with disabilities. *Title II Technical Assistance Manual* II-6.0000, II-6.3300(6). The design standards applicable to facilities covered by Section 504 and Title II also include specific provisions relating to correctional facilities. The DOJ Section 504 regulations adopt the Uniform Federal Accessibility Standards (UFAS).

In sum, Section 504 of the Rehabilitation Act, Title II of the ADA, and the specific provisions in the DOJ's regulations listing correctional facilities or departments as covered entities confirm that the Rehabilitation Act and the ADA apply to state and locally-operated correctional facilities.

II.

The weight of judicial authority also supports our conclusion that the ADA applies to prison programs. In *Crawford v. Indiana Department of Corrections*, ___ F.3d ___, 1997 WL 289101 (7th Cir. June 2, 1997), the Seventh Circuit held that Title II of the ADA applied to state prisons in the case of a blind, former state prisoner who sought damages resulting from his exclusion from a variety of programs, activities, and facilities at the prison that were routinely available to the prison's population, including educational programs, the library, and the dining hall. *Accord Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996); *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (holding Rehabilitation Act applicable).

Two circuits have questioned the applicability of Section 704 and Title II to prisons. See *Torcasio v. Murray*, 57 F.3d 1340, 1344-46 (4th Cir. 1995) (coverage of prisons by Section 504 and Title II not clearly established in qualified immunity context), *cert. denied*, 116 S. Ct. 772 (1996);

which apply to federal agencies and entities receiving federal financial assistance. 28 C.F.R. §42.522(b). UFAS lists "jails, prisons, reformatories" and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. subpt. 101-19.6, app. A at 150. Under Title II, covered entities building new or altering existing facilities may follow either UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). 28 C.F.R. §35.151(c); see *id.* pt. 36, app. A. Amendments to the ADAAG, adopted as an Interim Final Rule, effective December 20, 1994, by the Architectural & Transportation Barriers Compliance Board, include specific accessibility guidelines for "detention and correctional facilities." 59 Fed. Reg. 31676, 31770-72 (1994). The Department of Justice has proposed adoption of the interim final rule. *Id.* at 31808. The ADAAG is not effective until adopted by the DOJ.

White v. State of Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (neither ADA nor Rehabilitation Act applies to prison employment). In our view, these opinions are seriously flawed. The leading case in support of the Commonwealth's position is *Torcasio*, which was followed by the district court here, and so we focus our sights on that case.⁶

The Fourth Circuit in *Torcasio* acknowledged that the broad language prohibiting discrimination on the basis of disability in both statutes "appears all-encompassing," 57 F.3d at 1344. Nevertheless, the *Torcasio* court was reluctant to find either statute applicable to prisons because of the so-called "clear statement" doctrine, as set out in *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989):

if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 . . . (1985); see also, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 . . . (1984).

Because it found the operation of prisons to be a "core state function," 57 F.3d at 1345, and because neither Section 504 nor Title II includes an express statement of its application to correctional facilities, the *Torcasio* court expressed its doubt that Congress had "clearly" intended either statute to apply to state prisons. *Id.* at 1346.

This extension of the clear statement rule was unwarranted. *Will*, *Atascadero*, and *Pennhurst* all involved instances in which there had been no express waiver or abrogation of the state's traditional immunity from suit, either by the state itself (*Pennhurst*), or by Congress (*Will*, *Atascadero*). Here, in contrast, both Section 504 and Title

6. *Torcasio* did not decide whether either Section 504 or Title II of the ADA applies to prisons; rather, it concluded that such coverage was not clearly established at the time of the events at issue, and that the individual defendants in that case therefore were entitled to qualified immunity. In reaching its qualified immunity ruling, however, the *Torcasio* court discussed the reach of the two statutes at length, and expressed its doubt that either applied to prisons.

II of the ADA contain an "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several states." *Pennhurst*, 465 U.S. at 99 (internal quotation marks and citation omitted); see 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act."); *id.* § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of [the ADA].").

To be sure, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 461 (1991) (internal quotation marks and citations omitted). This requirement, however, is a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470. It is not a warrant to disregard clearly expressed congressional intent.

Torcasio's statement that Congress must specifically identify state or local prisons in the statutory text, if it wishes to regulate them, was expressly disavowed by the Supreme Court in *Gregory*. See *id.* at 467 ("This does not mean that the Act must mention judges explicitly."). Congress need only make the scope of a statute "plain." *Id.* And Congress has done that here. Both Section 504 and Title II speak unambiguously of their application to state and local governments and to "any" or "all" of their operations. In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms "any" and "all."

In *Crawford, supra*, just as in this case, the state relied on the fact that prison administration was a "core" state function in arguing that the clear statement rule was triggered. Judge Posner responded most forcefully:

Prison administration is indeed a core function of state government, as is education. But the state's concession

that the Americans with Disabilities Act applies to the prison's relations with its employees and visitors, as well as to the public schools, suggests that the clear-statement rule does not carry this particular core function of state government outside the scope of the Act. We doubt, moreover, that Congress could speak much more clearly than it did when it made the Act expressly applicable to all public entities and defined the term "public entity" to include every possible agency of state or local government. Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, *cf. Gregory v. Ashcroft, supra*, 501 U.S. at 461-63; but the mere provision of public services, such as schools and prisons, is not within that inner core.

Crawford, __ F.3d __, 1997 WL 289101, at *4. We agree.

III.

Despite the Commonwealth's contention to the contrary, moreover, *prisoners* (in contrast to *prisons*) are not excluded from coverage because Section 504 and Title II protect only "qualified individual[s] with a disability." That term is defined in Title II to mean:

an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). The terms "eligibility" and "participation" do not, as *Torcasio* stated, see 57 F.3d at 1347, "imply voluntariness" or mandate that an individual seek out or request a service to be covered. To the contrary, the term "eligibility" simply describes those who are "fitted or qualified to be chosen," without regard to their own wishes. See *Webster's Third New International Dictionary, supra* at 736.

Judge Posner addressed a related aspect of the case quite incisively:

It might seem absurd to apply the Americans with Disabilities Act to prisoners. Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off. But . . . there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management.

Crawford, __ F.3d __, 1997 WL 289101, at *5 (citations omitted). We agree here as well.

In sum, in enacting the ADA, Congress "invoke[d] the sweep of [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The "critical areas" in which "discrimination against individuals with disabilities persists" were set forth in the statute, and include "institutionalization." *Id.* § 12101(a)(3).

Thus, if the plain words of a statute are to guide the courts in interpreting it, then both statutes must be held to apply to state and local correctional facilities.⁷ Essentially, the Commonwealth is asking us to amend the statute, something we cannot do.

IV.

The foregoing discussion establishes that the ADA applies to Yeskey's claim. His claim for injunctive relief is, apparently, moot in view of the impending (or actual) completion of his prison term. His claim for damages will turn, presumably, on whether he should (or would) have been admitted to the boot camp. Even with the ADA applicable, Yeskey might not have been admitted for a number of reasons, which will have to be explored on remand.

The Commonwealth has invoked the specter of federal court management of state prisons:

Application of the ADA to internal prison management would place nearly every aspect of prison management into the court's hands for scrutiny simply because an inmate has a disability. See *Pierce v. King*, 918 F. Supp. 932, 941 (E.D.N.C. 1996). For instance, if the ADA applies to routine prison decisions, it is not unfathomable that courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments and to interfere with security procedures.

Brief at 15. Although these considerations do not override our conclusion that the ADA applies to prisons, our holding does not dispose of the controversial and difficult question whether principles of deference to the decisions of prison officials in the context of constitutional law apply to

7. We add that the legislative history does not inveigh against this conclusion. When the ADA was enacted in 1990, the Rehabilitation Act had been law for seventeen years and a number of cases had held it applicable to prisons and prisoners, yet Congress did not amend that Act or alter any language so as to extirpate those interpretations.

statutory rights. See generally *Robbins, supra*, at 94-97.⁸ We are not sure of the answer, and need not address that question now for, at all events, we doubt that it will be germane in this case. We do, however, "flag" it for another day.

The judgment of the district court will be reversed, and the case remanded for further proceedings consistent with this opinion.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

8. *Turner v. Safley*, 482 U.S. 78 (1987), establishes a four-part "reasonableness" test for judicial deference to prison management decisions in the face of constitutional challenges (usually under the Eighth Amendment). The first requirement is "a valid rational connection" between the regulation and the alleged governmental interest. The second inquiry is whether alternative means exist for inmates to exercise the right under consideration. The third issue is the effect that accommodation of the asserted right will have on security, administrative efficiency, prison staff, and the larger inmate population. The final prong of the test is whether an alternative means exists for prison officials to accomplish their objectives without infringing on inmates' rights. See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (reaffirmed the *Turner* standard with respect to alleged infringement of inmates' First Amendment right to free exercise of religion).

The Ninth Circuit has held that the *Turner* standard applies to statutory rights such as those created by the ADA. In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), the court reversed a lower court's ruling that denial of food-service positions to HIV-positive inmates discriminated against them impermissibly. Reasoning that, where constitutional protections bend, statutory privileges must too, the court deferred to the penological concerns asserted by prison officials. The Eighth Circuit disagrees. See *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995) (*Turner* does not foreclose all heightened judicial review.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7292

RONALD R. YESKEY,

APPELLANT

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS;
JOSEPH D. LEHMAN; JEFFREY A. BEARD, PH.D.;
JEFFREY K. DITTY; DOES NUMBER 1
THROUGH 20, INCLUSIVE,

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-02125)

Present: Becker, Roth, Circuit Judges, and Barry, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel January 31, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 10, 1996, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

Chief Deputy Clerk

Dated: July 10, 1997

*Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

No. 96-7292

Page 2

Costs Taxed In Favor of Appellant as follows:

Total for Brief	\$80.40
Total for Appendix	\$ 5.50
Total	\$85.90

Certified as a true copy and issued in lieu
of a formal mandate on August 1, 1997

Teste: _____

Chief Deputy Clerk, United States Court of Appeals for the
Third Circuit.

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY,	:	
Plaintiff	:	
	:	Civil Action No.
v.	:	1:CV-95-2125
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF CORRECTIONS,	:	(Judge Caldwell)
et al.,	:	
Defendants	:	

DEFENDANTS' MOTION TO STAY PROCEEDINGS

Defendants, by and through their attorneys, Sarah B. Vandenbraak, Chief Counsel, and Raymond W. Dorian, Assistant Counsel, respectfully request this Court to issue a stay of proceedings pending review of Defendants' application for Writ of Certiorari from the United States Supreme Court, pursuant to F.R.Civ. P. 62 (c) and F.R. App. 8 (a) and in support thereof, respectfully make the following arguments:

1. On December 21, 1994, Plaintiff filed suit against Defendants for alleged civil rights violations arising out of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, and his federal right to equal protection.

2. Plaintiff's complaint alleged that he had been denied access to, "programs, opportunities and benefits offered by the Defendants on the basis that he is a qualified person with a disability." (See Plaintiff's Complaint p. 2).

3. On April 9, 1996, this Court granted Defendant's [sic] Motion to Dismiss, on the ground that the Plaintiff failed to state a claim upon which relief may be granted, under F. R. Civ. P. 12(b)(6). In reaching this conclusion, the Court relied upon the reasoning of the Fourth Circuit Court of Appeals in Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), cert. denied sub nom. Torcasio v. Angelone, ____ U.S. ____, 116 S. Ct. 771(1996), which held that Title II of the ADA was too broad and non-specific to enable the court to conclude that Congress intended the statute to apply to prisons.

4. On July 10, 1997, a three judge panel of the United States Court of Appeals for the Third Circuit reversed the order of this Court, and remanded the case back for further proceedings. While declining to discuss the merits of Plaintiff's complaint, the Court of Appeals held that the daily administrative realm of state correctional facilities was encompassed within the scope of the ADA.

5. Defendants' Answer is due when this case proceeds. Defendants intend to raise the issues of the ADA's applicability to state prisons and whether Congress has the power pursuant to the Fourteenth Amendment to legislate the imposition of the ADA requirements on state government. In addition, Defendants intend to raise the related question of Eleventh Amendment immunity.

6. To date, there is a split among the various federal circuit courts of appeals as to whether the United States Congress intended state prison inmates to use the ADA as a vehicle to redress civil rights grievances. The Court of Appeals for the Third Circuit has joined the Seventh and Ninth federal circuit courts in their decision [sic] to recognize state prison inmate claims under Title II of the ADA. The Fourth and Tenth federal circuit courts have rejected this statutory interpretation. See Armstrong v. Wilson, 1997 U.S. App. LEXIS 22622 (9th Cir. 1997); Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996); Granville v. Md. Dept. of Public Safety and Correctional Services, 1997 U.S. App. LEXIS 25749 (4th Cir. 1997); White v. State of Colorado, 82 F.3d 364 (10th Cir. 1996). Thus, there is a split of authority among the various federal circuit courts on an issue of federal law before this court.

7. On September 15, 1997, Defendants filed a Motion to Recall and Stay the Mandate, under F. R. App. P. 41(b), entered by the Third Circuit Court of Appeals decision in the case remanded back to this court. Yeskey v. Dept. of Corrections, 1997 U.S. App. LEXIS 17364 (1997). A decision on Defendants' request has not yet been rendered.

8. On or before October 8, 1997, Defendants intend to file a Petition for Writ of Certiorari to the United States Supreme Court. The Petition will assert that Plaintiff's claims are not actionable under Title II of the ADA, and the split of authority

among the federal circuit courts requires the Court's intervention to clarify this area of law before it is applied to the case currently before this court. SUP. CT. R. 10.

9. There is a case management conference scheduled for Friday, October 3, 1997 at 11:30 AM in the above matter.

10. Defendants lack a mechanism similar to Rule 62(c) of the Federal Rules of Civil Procedure to request the district court to stay the circuit court's decision pending appeal to the United States Supreme Court. However, when an appeal of a district court ruling is pending, FED. R. APP. P. 8(a) provides that a stay of judgment must ordinarily be made in the first instance to the district court. See Marshall v. Berwich Forge & Fabricating Co., 474 F. Supp. 104 (M.D. Pa. 1979) (stating that application for stay pending appeal must ordinarily be sought first in district court and the fact that respondent has filed a notice of appeal does not defeat jurisdiction of district court). Rule 8(a) simply recognizes that the court of original jurisdiction can stay further proceedings in a case until jurisdiction passes with granting of appellate review to a higher court.

11. The factors regulating issuance of stay under both FED. R. CIV. P. 62(c) and FED. R. APP. P. 8(a) include: 1) whether the stay applicant has made a strong showing of likelihood of success on the merits, 2) whether the applicant will be irreparably injured absent the stay, 3) whether issuance of the stay will substantially injure other interested parties, and 4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 777 (1987).

12. The proceedings in this action should be stayed pending the review of Defendants' Petition for Writ of Certiorari by the United States Supreme Court for the following reasons:

(a) this [sic] case presents an appropriate issue for review by the U.S. Supreme Court;

(b) The proposed Writ of Certiorari concerns a matter of great importance to the public as well as the state prison administration;

(c) The decision of the Third Circuit Court of Appeals did not address the merits of Plaintiff's claim;

(d) There is a split of authority among the various federal circuit courts concerning whether Title II of the ADA applies to prisons;

(e) A decision by the U.S. Supreme Court will hopefully resolve the conflict among the circuit courts and give much needed guidance to the state prison administration concerning the applicability of the ADA;

(f) The Defendants' position is supported by the recent case of City of Boerne v. P.F. Flores, ___ U.S. ___, 117 S. Ct. 2157 (1997), which held that the Religious Freedom Restoration Act of 1993, ("RFRA"), 42 U.S.C. § 2000bb-2(l) was an unconstitutional intrusion into each State's right and authority to regulate for the health and welfare of their [sic] citizens;

(g) Defendants' position is further supported by the Supreme Court's line of cases regarding deference to the administrative authority of state correctional authorities. See e.g., Sandin, ___ U.S. ___, 115 S. Ct. at 2299 (federal district courts must "afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); Turner v. Safley, 482 U.S. 78 (1987) ("where state penal institutions are involved, federal courts have a further reason for deference to the appropriate authorities");

(h) As indicated by the Court of Appeals' own opinion, state prison administration is governed by federal constitutional jurisprudence and may ultimately be in conflict with the statutory dictates of the ADA. The Court of Appeals acknowledged the existence of this legal quandary, yet failed to guide the Defendants on how to resolve this apparent dilemma. See Yeskey, 1997 U.S. App. LEXIS 17364 at *19. [sic]

(i) Defendants' request is made in the interest of judicial economy and is not intended to delay or forestall final resolution of these proceedings;

(j) The Plaintiff will not be prejudiced by the stay of proceedings, since he is no longer incarcerated in a correctional facility; therefore he is no longer eligible for enrollment in the program [sic] which he sought admission;

(k) The Defendants will be harmed if the stay is not granted, since they will then be required to defend an action in district court which may ultimately be rendered moot by the decision of the U.S. Supreme Court;

(l) The resources of the parties will be conserved by the stay of proceedings; and

(m) The magnitude of risks and costs facing the Defendants is of much greater proportion than any burden Plaintiff will shoulder if further proceedings are not stayed.

13. Further, it has been held that a district court may authorize a stay pending an appeal without requiring a supersedeas bond to be filed. Olympia Equipment v. Western Union Tele. Co., 786 F. 2d 794 (7th Cir. 1986), cert. denied, 480 U.S. 934, 107 S. Ct. 1574, 94 L.Ed. 2d 765 (1987); Prudential Insurance Co. v. Boyd, 781 F.2d 1494 (11th Cir. 1986).

14. Counsel for Plaintiff has authorized the undersigned to represent that he does not oppose a stay of these proceedings.

WHEREFORE, for the foregoing reasons, Defendants respectfully request this Court to stay further proceedings pending review of Defendants' Petition for Writ of Certiorari by the United States Supreme Court.

Respectfully submitted,

/s/ Sarah B. Vandenbraak
 Sarah B. Vandenbraak,
 Chief Counsel
 Attorney I.D. No. 30382

/s/ Raymond W. Dorian
 Raymond W. Dorian
 Assistant Counsel
 Attorney I.D. No. 48148

Pa. Department of Corrections
 55 Utley Drive
 Camp Hill, PA 17011
 (717) 731-0444

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RONALD R. YESKEY,	:	
Plaintiff	:	
	:	Civil Action No.
v.	:	1:CV-95-2125
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF CORRECTIONS,	:	(Judge Caldwell)
et al.,	:	
Defendants	:	

CERTIFICATE OF CONCURRENCE

Pursuant to Middle District local rule 7.1, the undersigned counsel hereby certifies that he has contacted counsel for the Plaintiff concerning the above Motion for Stay of Proceedings and Plaintiff's counsel has indicated that he concurs in the Defendants' Motion.

Respectfully submitted [sic]

/s/ Raymond W. Dorian

RAYMOND W. DORIAN
Assistant Counsel
Attorney I.D. No. 48148

Pa. Department of Corrections
55 Utley Drive
Camp Hill, Pa 17001
(717) 731-0444

DATE: September 30, 1997

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RONALD R. YESKEY,	:	
Plaintiff	:	
	:	Civil Action No.
v.	:	1:CV-95-2125
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF CORRECTIONS,	:	(Judge Caldwell)
et al.,	:	
Defendants	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day forwarding a true and correct copy of the foregoing Defendants' Motion for Stay of Proceedings upon the person(s) and in the manner indicated below.

Service by first-class mail
addressed as follows:

L. Abraham Smith, Esquire
P.O. Box 1644
Greensburg, PA 15601

/s/ Raymond W. Dorian

Raymond W. Dorian
Assistant Counsel
Attorney I.D. No. 48148

Pa. Department of Corrections
55 Utley Drive
Camp Hill, Pa 17001
(717) 731-0444

Dated: September 30, 1997

IN THE UNITED STATES DISTRICT COURT
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RONALD R. YESKEY,	:	
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	:	
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COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF CORRECTIONS,	:	(Judge Caldwell)
et al.,	:	
Defendants	:	
	:	

ORDER

AND NOW, this 1st day of October, 1997, upon consideration of the Defendants' Motion for Stay of Proceedings, which is unopposed, it is hereby ORDERED that Defendants' Motion is GRANTED and all proceedings in this matter are stayed pending the final disposition of Defendants' Petition for Writ of Certiorari by the United States Supreme Court.

BY THE COURT:

/s/ William W. Caldwell

J.

3
No. 97-634

Supreme Court, U. S.

FILED

MAR 4 1998

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONERS

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(*Counsel of Record*)

SYNDI L. GUIDO
Deputy General Counsel

Office of General Counsel
333 Market Street
17th Floor
Harrisburg, PA 17101
Telephone (717) 783-6563
Counsel for Petitioners

QUESTION PRESENTED

Does the Americans with Disabilities Act apply to inmates in state prisons?

LIST OF PARTIES

Respondent, Ronald R. Yeskey, filed this action against the Commonwealth of Pennsylvania, Department of Corrections; Joseph D. Lehman, in his former capacity as Secretary of the Department; Jeffrey A. Beard, in his former capacity as the Superintendent at the State Correctional Institution at Camp Hill; and Jeffrey K. Ditty, in his capacity as Director of the Central Diagnostic and Classification Center at the State Correctional Institution at Camp Hill.

Joseph D. Lehman has been succeeded by Martin F. Horn. The current Superintendent at the State Correctional Institution at Camp Hill is Kenneth Kyler.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONERS

**OPINIONS AND ORDERS
ENTERED BELOW**

The opinion and order of the United States Court of Appeals for the Third Circuit are reported at 118 F.3d 168 (3d Cir. 1997) and are reprinted in the Joint Appendix at JA-122 to JA-135. The opinion and order of the United States District Court for the Middle District of Pennsylvania are not reported but are reprinted in the Joint Appendix at JA-95 to JA-100. The Magistrate Judge's Report and Recommendation were issued on January 23, 1996. The report and recommendation are not published but are reproduced in the Joint Appendix at JA-83 to JA-100.

STATEMENT OF JURISDICTION

On April 9, 1996, the United States District Court for the Middle District of Pennsylvania dismissed this action pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The judgment was reversed by the United States Court of Appeals for the Third Circuit on July 10, 1997. A timely petition for writ of certiorari was filed, and this Court granted certiorari on January 23, 1998. This Court has jurisdiction to review the Third Circuit's decision pursuant to 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The powers of Congress are enumerated in Article I, § 8 of the United States Constitution. Clause 3, the Commerce Clause, gives Congress the following power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

The Americans with Disabilities Act ("ADA") is found at 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225 and 611. The complete text of §§ 12101, 12102, and 12131-12134 is set forth verbatim in the appendix at A-1 to A-5.

The Rehabilitation Act of 1973 is found at 29 U.S.C. §§ 701-797b. The text of §§ 701 and 794 is set forth verbatim in the appendix at A-5 to A-9.

Pennsylvania's Motivational Boot Camp Act is found at Pa. Stat. Ann. tit. 61, §§ 1121-1129 (West Supp. 1997). The complete text is set forth verbatim in the appendix at A-9 to A-14.

The Department of Justice has issued regulations implementing Title II ("Public Services"), subtitle A ("Prohibition Against Discrimination and Other Generally Applicable Provisions"), of the ADA. Those regulations, entitled "Nondiscrimination on the Basis of Disability in State and Local Government Services," are located in part 35 of title 28 of the Code of Federal Regulations. The text of 28 C.F.R. §§ 35.130 and 35.150 (1998) is set forth verbatim in the appendix at A-15 to A-21.

STATEMENT OF THE CASE

In May 1994, the Court of Common Pleas of Westmoreland County sentenced the respondent, Ronald R. Yeskey, to serve 18 to 36 months in a Pennsylvania state prison. JA 6, Complaint, ¶ 9. The sentencing judge recommended Yeskey for placement in a motivational boot camp. JA 6, Complaint, ¶ 10.

Pennsylvania's boot camp was established pursuant to the Motivational Boot Camp Act, Pa. Stat. Ann. tit. 61, §§ 1121-1129 (West Supp. 1997). The boot camp provides, among other things, rigorous physical activity, intensive regimentation

and discipline, and work on public projects. Pa. Stat. Ann. tit. 61, § 1123. If an inmate successfully serves six months of his sentence at the boot camp, the inmate is released on parole for intensive supervision by the Pennsylvania Board of Probation and Parole. Pa. Stat. Ann. tit. 61, § 1127. Pursuant to Pennsylvania law, the Department of Corrections has the discretion to assign certain inmates to the boot camp. Pa. Stat. Ann. tit. 61, § 1126. In this regard, the Department is not required to follow the sentencing court's recommendation. Pa. Stat. Ann. tit. 61, § 1126(d).

In July 1994, prison officials told Yeskey that he was not eligible for placement in the motivational boot camp due to his medical history of hypertension. JA 6, Complaint, ¶ 11. In December 1994, Yeskey filed suit in the United States District Court for the Western District of Pennsylvania. JA 3. Yeskey claimed that the Department's refusal to place him in the boot camp violated his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, the Eighth and Fourteenth Amendments, and the Pennsylvania Constitution. JA 3. The action was subsequently transferred to the United States District Court for the Middle District of Pennsylvania. JA 81.

On April 9, 1996, the district court held that the ADA is not applicable to state prisoners and dismissed Yeskey's complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. JA 100. On July 10, 1997, the United States Court of Appeals for the Third Circuit reversed and remanded for further proceedings in the district court. A petition for writ of certiorari was filed on October 8, 1997. Certiorari was granted on January 23, 1998.

SUMMARY OF ARGUMENT

The lower court erroneously concluded that Title II of the ADA is applicable to state prisoners and reinstated this lawsuit, which had been properly dismissed by the district court. In doing so, the court of appeals refused to apply an ordinary rule of statutory construction: Where Congress intends to alter

the usual balance of power between the state and federal governments, it must do so in unmistakable terms. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This Court has repeatedly recognized the sovereign nature of state prison management, emphasizing the need to give state prison administrators wide discretion in dealing with the unique problems of managing a volatile environment. *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Obviously, application of the ADA to state prisons would upset the balance of power by allowing federal regulation of a sovereign state function. Yet the text of the statute is ambiguous, at best, about its application to state prisons.

The ADA was enacted to integrate disabled citizens into the economic and social mainstream of public life, and it prohibits public entities from excluding any "qualified individual with a disability" from its "services, programs, or activities" on the basis of their disability. 42 U.S.C. § 12132 (1994). Although the term "public entity" is broadly defined to include states and their agencies, prisons are not expressly mentioned in the statute and are not normally considered to provide "services, programs, or activities" as those terms are commonly understood. The name given to Title II — "Public Services" — connotes a ban on discrimination in services provided to the public. Prisons do not provide services to the public; they intentionally isolate and confine individuals, against their will, from the rest of society. Rights to which prisoners would otherwise be entitled are necessarily and substantially restricted. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

The ADA's ambiguity is plainly demonstrated by the fact that federal judges across this country have sharply disagreed on its application to state prisoners. Even in those circuits where the court of appeals found the ADA applicable to state prisoners, many of the district court judges — including the one in this case — had reached the opposite conclusion.

In the face of an ambiguous statute that will alter the usual balance of power if applied to state prisoners, the lower court should have applied the clear statement rule. Instead, the court deferred to regulations promulgated by the Department of Justice, which interpret the ADA as applicable to

state prisoners. Such deference is inappropriate where state sovereignty will be adversely affected, a fact which is underscored by the onerous regulations that have been promulgated to implement the ADA. Given the statute's severe impact on the balance of power between the state and federal governments, Congress should be required to state, in unmistakable terms, that it is intentionally invading state prison management — an area of historic state sovereignty.

Significantly, the clear statement rule complements another basic principle of statutory interpretation: Whenever possible, an act should be interpreted to reach a constitutional result. The ADA was ostensibly enacted pursuant to Congress's power to regulate commerce, as well as its power to enforce the Fourteenth Amendment. However, neither of those powers allows federal regulation of state prison systems.

Congress cannot be allowed to regulate state prisons through its Commerce Clause power; otherwise, it is difficult to perceive any limitation in an area where states have historically been sovereign. *United States v. Lopez*, 514 U.S. 549, 564 (1995). Prison administration is not a commercial activity nor does it substantially affect interstate commerce. When federal legislation impinges only upon state activities, the Court imposes a more stringent review, focusing on principles of federalism. *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). For this reason, the federal government may not compel states to administer a federal regulatory program. *Id.* Such commands diminish public accountability and are fundamentally incompatible with dual sovereignty. *Id.* at 2384.

Likewise, congressional power to enforce the Fourteenth Amendment does not authorize Congress to engage in federal regulation of state prisons. Although broad, Congress's power is remedial, not substantive, and it does not override all principles of federalism. *Gregory*, 501 U.S. at 469; *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997). If the ADA encompasses matters of state prison management, it is not proper remedial legislation. Disabled prisoners do not enjoy protected status, and the ADA cannot grant them federally-enforceable rights that exceed those provided by the Constitu-

tion. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985); *City of Boerne*, 117 S. Ct. at 2170 (1997).

Undoubtedly, application of the ADA to state prisoners would raise serious questions about the statute's constitutionality — questions that can be avoided by reasonable application of the clear statement rule. See *Gregory*, 501 U.S. at 464. Because Congress has not clearly manifested an intent to apply the ADA to state prisoners, the act should be interpreted to exclude them from its scope.

ARGUMENT

I. FEDERAL REGULATION OF STATE PRISONERS WOULD INTRUDE ON A SOVEREIGN STATE FUNCTION.

A state's power to manage its own prisons is one of the most fundamental aspects of state sovereignty. See *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (creating and enforcing a criminal code is foremost among a state's exclusive sovereign prerogatives); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (maintaining prisons is an essential part of enforcing the criminal law). Under our system of federalism, "each state is wholly autonomous in the management of its correctional system," just as each state is autonomous in the management of its government and judicial systems. Warren E. Burger, *Factories with Fences: The Prison-Industries Approach to Correctional Dilemmas*, in 3 *Prisoners and the Law* 21-3, 21-6 (Ira P. Robbins ed., 1996). In fact, it "is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973).

The local nature of prison management is clearly demonstrated by the history of Pennsylvania's own correctional system, which traces its roots back more than a hundred years prior to ratification of the United States Constitution. Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania*

31-35 (1968). Pennsylvania's founder markedly changed the way crimes were punished throughout the world when William Penn's Great Law was enacted on December 7, 1682. For the first time in history, torture and mutilation were generally discarded in favor of a system of fines and imprisonment at hard labor in local jails. *Id.*

America's first penitentiary was built in Philadelphia in 1773; it became a state facility in 1789, forming the basis for the country's state prison systems. Negley K. Teeters, *The Cradle of the Penitentiary* 1 (1955). The first federal prison was not built until 1895, and only three federal prisons existed before 1925. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1147 (April 1995). To this day, the states retain primary responsibility for matters of crime and punishment, and state prisons house the vast majority of prisoners. Lawrence M. Friedman, *Crime and Punishment in American History* 262 (1993). As recently as 1996, 94 percent of all prisoners in this country were still housed in correctional facilities controlled by state and local governments. Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics-1996*, Table 6.11 (1997).

In Pennsylvania, there are 35,000 state prisoners housed in 23 state prisons, 15 community corrections centers, and a motivational boot camp. Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget*, at E13.6; Camille Graham Camp and George M. Camp, *The Corrections Yearbook 1997* (Criminal Justice Institute 1998). Pennsylvania's prison population has increased 338 percent since 1980, when the state prison system housed only 8,000 inmates in seven state prisons and two regional correctional facilities. Camille Graham Camp and George M. Camp, *The Corrections Yearbook 1981* (Criminal Justice Institute 1982); Commonwealth of Pennsylvania, *Governor's Executive Budget 1980-81*, at 170. In this decade alone, Pennsylvania's prison population has nearly doubled, and the state has been forced to open nine new prisons. Compare Commonwealth of Pennsylvania, *1990-91 Gov-*

ernor's Executive Budget, at E12.05 with Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget*, at E13.6. Despite constant expansion of its facilities, Pennsylvania's state prisons are still operating at approximately 150 percent of capacity. Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget*, at E13.11.¹

Naturally, managing such a large, rapidly-growing prison population requires a delicate balance between operational and fiscal concerns and the paramount issue of security. "Behind the steel bars are murderers, robbers, rapists, drug dealers, extortionists, swindlers, child molesters, and people who are guilty of other equally ugly crimes." Daniel J. Bayse, *Working in Jails and Prisons: Becoming Part of the Team* 1 (American Correctional Association 1995). "Inmates are always looking for ways to beat the system and for ways to get staff members to help them do it." *Id.* at 34.

In prison, every single activity must take place with strict adherence to existing institutional routines, rules, and regulations. *Id.* at 18. "Incoming mail is opened and checked for contraband. Schedules are set. Meals are served at prescribed times. Even the serving trays and utensils are chosen with security in mind." *Id.* at 34. Of course, security concerns may also require that the daily routine and programs be cancelled at a moment's notice for reasons that may not be understood by those outside the prison walls. *Id.* at 16. Seemingly pointless prison rules are necessary to maintain discipline. For example, to prevent male inmates from escaping in female disguise, some prisons will not allow women to enter with lipsticks or wigs. *Id.* at 55.

¹ These increases in Pennsylvania's prison population, and the corresponding burden to Pennsylvania's prison administration, have had a dramatic effect upon the taxpayers of Pennsylvania. For the 1980-81 fiscal year, for example, the Pennsylvania General Assembly appropriated less than \$93 million for the use and operation of its state correctional facilities and community treatment centers. See 1980 Pa. Laws 1406. By comparison, for the 1998-99 fiscal year, Governor Ridge has proposed an operating budget for the state correctional facilities which is in excess of \$1 billion dollars — an increase of more than 1,000 percent from the 1980-81 fiscal year. Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget*, at E13.10.

During incarceration, many rights enjoyed by private citizens must be curtailed, and inmates have little or no privacy. Windows or bars allow constant observation. *Id.* at 33. "For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State. . . ." *Preiser*, 411 U.S. at 492. Because body cavities offer a popular way to smuggle drugs throughout the correctional system, inmates are not even allowed to go to the toilet or shower in private. *Bayse*, at 33. Inmates are necessarily subjected to random strip searches, including examination of their body cavities, in order to keep weapons or other forms of contraband out of the prison. *Id.* "The threat is real. One Alabama prison has a copy of an x-ray mounted on the wall showing a small automatic pistol an inmate had hidden in his rectum." *Id.*

Indeed, this Court has recognized that the "problems of prisons in America are complex and intractable," and most of them "require expertise, comprehensive planning, and the commitment of resources." *Procunier*, 416 U.S. at 404. The adoption and execution of policies and practices to preserve internal order, discipline, and institutional security are "peculiarly within the province and professional expertise of corrections officers." *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979). These are fundamental, sovereign decisions that must be given great deference. *Id.*

Even those circuits that have found the ADA applicable to prisons have recognized that doing so may produce absurd results. The court below acknowledged the reality that federal courts will be used to reconstruct prison cells, to alter scheduling of inmate movements and assignments, and to interfere with security procedures. *Yeskey*, 118 F.3d at 174; JA 133. The Seventh Circuit conceded that a literal application of the statute to prisons may produce anomalies because the act is intended to "mainstream" disabled people. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997). The court recognized that the "failure to exclude prisoners may

well . . . have been an oversight" but refused to create an exception in order "to save the statute from generating absurd consequences." *Id.* at 486-47.²

If the ADA is applied to prisons, states will be forced to implement federal policies, and state prisons will be subject to regulatory oversight by the Department of Justice. State officials will face constant litigation in which federal judges second-guess the reasonableness of administrative decisions, a practice repeatedly denounced by this Court. Undoubtedly, the normal balance of power between state and federal governments will be affected.

II. BASED ON THE CLEAR STATEMENT RULE, TITLE II OF THE ADA DOES NOT APPLY TO STATE PRISONERS.

When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). This requirement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). It is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

If Congress meant for the ADA to affect state prisons, the usual constitutional balance of power would clearly be altered. Yet, that intent is not reflected in the statutory lan-

² The Ninth Circuit recently affirmed its position that both the ADA and the Rehabilitation Act of 1973 apply to state prisons. *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686). However, the court has explicitly recognized that the Rehabilitation Act "was not designed to deal specifically with the prison environment; it was intended for general societal application." *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994). The same holds true with the ADA.

guage as a whole. Moreover, both the purposes and legislative history of the ADA are incompatible with a congressional decision to encroach on the states' sovereignty by interfering with matters of state prison management.

A. The text of Title II is ambiguous, at best, about its application to state prisoners.

This suit was brought under the provisions of Title II, "Public Services." However, nothing in that title indicates that Congress ever meant to extend its protections to state prisoners. Section § 12132 provides:

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1994). The term "qualified individual with a disability" means:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

By definition, public entities include "any State . . . government" and "any department, agency, . . . or other instrumentality of a State or States." 42 U.S.C. § 12131(1)(A) and (B) (1994). The statute does not define what is meant by the terms "services, programs, or activities," and it is far from clear that Congress was attempting to intrude on matters of state prison management.

B. The ADA's findings, purposes, and legislative history demonstrate that Congress never intended for it to apply to state prisoners.

The ADA was enacted in response to pervasive discrimination against the disabled in mainstream America. Congress heard testimony from mothers, fathers, and children; from students and workers. All spoke eloquently about the daily problems they encounter in society as a result of their disabilities. See Arlene B. Mayerson, *Americans With Disabilities Act Annotated, Legislative History, Regulations & Commentary*, Volume I (1997).

In order to integrate disabled citizens into the economic and social mainstream of American public life, Congress enacted the ADA. House Comm. on Educ. and Labor, *Americans With Disabilities Act of 1990*, H.R. Rep. No. 101-485, pt. 2, at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303-04. The act promises "a future of inclusion and integration, and the end of exclusion and segregation." House Comm. on the Judiciary, H.R. Rep. No. 101-485, pt. 3, at 25-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447-49.

The "Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8) (1994). Congress was troubled by "the continuing existence of unfair and unnecessary discrimination and prejudice" which "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(9). The "dependency and nonproductivity" of disabled individuals "costs the United States billions of dollars in unnecessary expenses." *Id.*

Reading these legislative findings, it is difficult to imagine that Congress ever envisioned that the ADA would be applied

to state prisoners.³ Prison is not a free society, and all of the inmates are necessarily dependent on their custodians. Requiring state prison administrators to comply with the ADA will not reduce the costs of that dependency but will increase those costs dramatically. Prisons incarcerate a large percentage of individuals who will be able to claim some form of disability that will require special modifications of programs, services, or facilities. See *Yeskey*, 118 F.3d at 169; JA 124 (acknowledging that the question of the ADA's applicability to prisons is important, "especially in view of the increased number of inmates, including many older, hearing-impaired, and HIV-positive inmates, in the nation's jails"); *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996) (pointing out the formidable practical problems presented by the fact that "alcoholism and other forms of addiction are disabilities within the meaning of the Act and afflict a substantial portion of the prison population").

Both the Seventh and Third Circuits have conceded that "the propensity of some [prisoners] to sue at the drop of a hat is well known; [and] prison systems are strapped for funds. . . ." *Yeskey*, 118 F.3d at 174; JA 132 (quoting *Crawford*, 115 F.3d at 486). If the ADA is applied in prisons, inmates will be able to manipulate state officials by forcing them to weigh the prospect of costly litigation against the cost of relenting to demands for unreasonable accommodations.

ADA litigation is very fact-intensive, requiring intrusive federal-court inquiries into virtually every aspect of prison

³ Congress directed the Attorney General to implement the ADA by promulgating regulations consistent with the provisions of the ADA as well as regulations implementing § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994), 42 U.S.C. § 12134(a) and (b) (1994). Like the ADA, the introductory language of the Rehabilitation Act contains not even a hint that Congress intended its protections to apply to state prisoners. Rather, the Rehabilitation Act recognizes that "disability is a natural part of the human experience and in no way diminishes the right of individuals" to "live independently," "enjoy self-determination," "make choices," "contribute to society," "pursue meaningful careers," and "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." 29 U.S.C. § 701(a)(3) (1997). These are all rights that prisoners have forfeited for the duration of their confinement.

management. See, e.g., *Torcasio v. Murray*, 862 F. Supp. 1482, 1493-95 (E.D. Va. 1994), *aff'd in part, rev'd in part*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (examining whether showers, toilets, pod tables, cell doors, location of housing unit and cell, outdoor recreational activities and facilities, and indoor recreational activities were suitably modified for a morbidly obese inmate). The burdens that prisoner litigation places on state prison officials has been an area of immense concern for Congress and the courts.⁴ It is nonsensical to think that Congress was trying to cut the costs of prisoners' dependency on state taxpayers by giving inmates yet another avenue of legal recourse against the states.⁵

⁴ In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), P.L. 104-134. The PLRA was designed to end micromanagement of state prisons by federal courts and to reduce the burdens of prisoner litigation. See, e.g., 141 Cong. Rec. S14316-17 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) (making clear that PLRA seeks to curtail interference by the federal courts in the orderly administration of prisons); 141 Cong. Rec. S14611 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (noting the serious problem with the volume of lawsuits filed by prisoners, and the need to prevent prisoner litigation from needlessly interfering with prison administrators); 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (noting that the PLRA was intended to address the alarming explosion of prisoner lawsuits). The federal courts have also noted the important governmental interests in reducing the burdens of prisoner litigation. See *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 2460 (1997) (finding that Congress had a legitimate interest in preserving state sovereignty from overzealous supervision by the federal courts in the area of prison conditions litigation); *Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997) (noting that deterring frivolous and malicious lawsuits is a legitimate state interest and that pro se civil rights litigation has become a "recreational activity" for many state prisoners). See also The 1997 Year-End Report on the Federal Judiciary at 5-6 (Chief Justice Rehnquist noting that Congress acted wisely in enacting the PLRA which has reduced the monthly civil rights filings by prisoners by 46%).

⁵ The possible fiscal ramifications, and serious operational complications, of applying the ADA to prisoners are illustrated by a recent federal court decision. In *Purcell v. Pennsylvania Dep't of Corrections*, the United States District Court for the Eastern District of Pennsylvania held that the Commonwealth and its officials might even be required to pay punitive damages for violating an inmate's rights under the ADA. See *Purcell v. Pennsylvania Dep't of Corrections*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *39 (E.D. Pa. Jan. 9, 1998). In that case, the plaintiff, Timothy Purcell, is

By the same token, Congress was obviously not referring to prisoners when it decried the fact that the disabled are relegated to a position of political powerlessness in our society. 42 U.S.C. § 12101(a)(7). Rather, Congress found persistent discrimination against disabled individuals "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, *institutionalization*, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3) (emphasis added). The court below erroneously equated the word "institutionalization" in § 12101(a)(3) with state prison systems. The legislative history reveals that the term "institutionalization" has nothing to do with prisons. Instead, it refers to the preceding finding — that discrimination against the disabled is a serious and pervasive problem because society has historically tended to isolate and segregate disabled individuals. 42 U.S.C. § 12101(a)(2).

In fact, the language of § 12101(a)(2) and (3) was taken, almost verbatim, from a report issued by the United States Commission on Civil Rights. See United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 159 (1983). The Commission stated:

Historically, society has tended to isolate and segregate handicapped people. Despite some improvements, particularly in the last two decades, discrimination continues to be a serious and pervasive social

a state prisoner who allegedly suffers from Tourette's Syndrome, which is a neurological impairment characterized by motor and verbal tics (involuntary motor twitches, grunts, clicks, and shouts of obscenities), as well as coprolalia (the use of foul language, particularly of words relating to feces). Purcell was found guilty of misconduct for refusing to obey a direct order either to go to the infirmary for his scheduled medical appointment or to sign a release from medical treatment. The district court denied summary judgment based, in part, on its conclusion that prison officials "had an obligation to 'accommodate' Purcell's Tourette's by permitting him to return to his cell when he needed to release his verbal and motor tics." *Id.* at *26. The court found that it is important to allow Purcell to "release these symptoms in private to avoid the embarrassment of 'exploding' in front of others." *Id.* at *3.

problem. It persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation.

Id. The Commission's report focuses on the systematic placement of handicapped people in substandard residential institutions, where they are segregated from their families, normal society, peer groups, and members of the opposite sex. *Id.* at 32-35. That report was entered as testimony before House and Senate subcommittees and later quoted in the committee reports. Senate Comm. on Labor and Human Resources, S. Rep. No. 101-116, at 8 (1989); House Comm. on Educ. and Labor, H.R. Rep. No. 101-485, pt. 2, at 31 (1990).

Moreover, during the floor debates, Congress expressed concern about the common practice of institutionalizing, segregating, and isolating persons with disabilities when it was neither necessary nor appropriate. 135 Cong. Rec. S4993 (daily ed. May 9, 1989) (statement of Sen. Kennedy). Throughout the country, individuals with developmental disabilities were forced to live in large-scale residential institutions for handicapped people. United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 32-33(1983). The vast majority of those residents did not need to be segregated and were being "denied the opportunity to control their own lives." 135 Cong. Rec. S4994 (daily ed. May 9, 1989) (statement of Sen. Durenberger).

It is evident that Congress was concerned about the practice of institutionalizing individuals because of their disabilities; Congress was not concerned about institutionalizing people because of their criminal conduct. Isolation and segregation are an accepted and necessary management tool in all prison systems because managing prison inmates is very different from serving the general public. Inmates are often violent and manipulative. They are in prison, confined against their will, because of their refusal to obey the law. Rights to which they would otherwise be entitled are necessarily and substantially restricted. See *Price v. Johnston*, 334 U.S. 266, 285 (1948)

("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

Prison administrators need to be given broad latitude to manage state prisons, limited only by constitutional requirements. See *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). Nothing in the ADA or its legislative history indicates that Congress considered the complex problems of prison administration and, nonetheless, decided to meddle in decisions of the most fundamental sort for a state sovereign.

C. The sharp disagreement among federal courts on the ADA's applicability to state prisoners proves its ambiguity and compels application of the clear statement rule.

As illustrated above, it is unclear whether Title II of the ADA was meant to encompass the management of state prisoners. This ambiguity is plainly demonstrated by the fact that federal judges across this country sharply disagree on the issue.⁶

The court below held that the statute is not ambiguous and clearly covers state prisoners. The court was heavily influ-

⁶ Indeed, even in those circuits where the court of appeals eventually held that the ADA does apply to state prisoners, many district court judges disagreed. For example, the Third Circuit's decision in *Yeskey* and the Seventh Circuit's decision in *Crawford* both reversed district court opinions holding that the ADA did not apply to state prisoners. *Yeskey*, 118 F.3d at 170; JA 124; *Crawford*, 115 F.3d at 487. See also *Longo v. Barbo*, No. 94-3919, 1996 U.S. Dist. LEXIS 11453, *1, *3 (D.N.J. Aug. 9, 1996) (finding that it was not clearly established that either the ADA or the Rehabilitation Act applied to prisoners; the language of the act is "not so broad" as to clearly apply and the court found it doubtful that Congress intended to enhance "so dramatically" a disabled prisoner's constitutional rights); *Little v. Lycoming County*, 912 F. Supp. 809 (M.D. Pa. 1996), *aff'd without op. sub nom.*, *Little v. Smith*, 101 F.3d 691 (3d Cir. 1996) (following *Torcasio* to find that the ADA was inapplicable to state prisons absent a clear expression of congressional intent); *King v. Edgar*, No. 96 C 4137, 1996 U.S. Dist. LEXIS 17999 (N.D. Ill. Dec. 4, 1996) (finding no indication Congress meant the ADA to be applied to state prisons); *Fowler v. Gomez*, No. C 94-2679, 1995 U.S. Dist. LEXIS 19543 (N.D. Cal. Nov. 22, 1995) (finding the ADA's applicability to state prisons was not clearly established).

enced by the Seventh Circuit's opinion in *Crawford*, and quoted from it extensively. See *Yeskey*, 118 F.3d at 173-74; JA 130-132. Yet, even the author of *Crawford* has vacillated on the statute's clarity.

Only a year before he wrote the opinion in *Crawford*, Chief Judge Posner believed that the statute was unclear. See *Bryant v. Madigan*, 84 F.3d at 248. Writing for the court, Chief Judge Posner expressed strong doubts about the ADA's applicability in the prison context:

It is very far from clear that prisoners should be considered "qualified individual[s]" within the meaning of the Act. Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society? Most rights of free Americans, including constitutional rights such as the right to free speech, to the free exercise of religion, and to marry, are curtailed when asserted by prisoners; and there are formidable practical objections to burdening prisons with having to comply with the onerous requirements of the Act, especially when we reflect that alcoholism and other forms of addiction are disabilities within the meaning of the Act and afflict a substantial proportion of the prison population Judge-made exceptions to laws of general applicability are justified to avoid absurdity. And an exception to the Americans With Disabilities Act for prisoners, though not express, may have textual foundation in the term "qualified individual."

Id. at 248-49 (internal citations omitted) (emphasis added).

The Fourth Circuit has thoughtfully reviewed the opinions of the Third, Seventh, and Ninth Circuits and explicitly rejected them. In a thorough and well-reasoned opinion, the Fourth Circuit pointed out numerous ambiguities in the statutory text "which reveal that Congress failed to speak with unmistakable clarity on the issue of whether the . . . ADA appl[ies] to state prisons." *Amos v. Maryland Dep't of Pub. Safety and Correctional Services*, 126 F.3d 589, 600 (4th Cir.

1997), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113). Although the definition of "public entity" is broad, prisons are not expressly mentioned in the statute and "they certainly do not come readily to mind as the type of institution covered." *Id.* at 596. The court noted that even "the name ascribed to Title II of the ADA — 'Public Services' — connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded." *Id.* State prisons "thus do not fit neatly within the definition of 'public entities' to which the ADA applies. . . ." *Id.*

Moreover, the ADA defines a "qualified individual with a disability" as a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." 42 U.S.C. § 12131. "The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will." *Id.* Correctional facilities "do not provide 'services,' 'programs,' or 'activities' as those terms are ordinarily understood." *Amos*, 126 F.3d at 600. Incarceration requires the provision of a place to sleep and eat. It is not a "program" or "activity." *Id.* at 601. The operations of state prisons fall naturally within the statutory terms "services," "programs," and "activities" only when particular services, activities, or programs are divorced from the context of correctional facilities. *Id.* For example, a family outing to the local public library falls quite naturally within the common understanding of the meaning of "activity." However, a prisoner's use of a court-mandated prison law library does not fall naturally within the ambit of that statutory term. *Id.* The Fourth Circuit notes that "most prison officials would be surprised to learn that they were" required to provide inmates with "services," "programs," or "activities" as those terms are ordinarily understood. *Id.*

Plainly, the circuits are sharply divided on the ADA's applicability to state prisoners. This debate has been heated at times. For instance, the court below rejected the Fourth Circuit's reasoning as "seriously flawed." *Yeskey*, 118 F.3d at 172; JA 129 (criticizing *Torcasio*, 57 F.3d at 1344-46). The Fourth

Circuit responded by criticizing the Third, Seventh, and Ninth Circuits for engaging in "interpretive gymnastics" and characterized the Third and Seventh Circuits as "contortionists." *Amos*, 126 F.3d at 600. Each circuit remains firmly convinced of its view, and those views are diametrically opposed to each other. This fact, in and of itself, should make it plain that Congress has not spoken with anywhere near the clarity required to alter the usual federal-state balance of power.

D. The lower court should have applied the clear statement rule instead of deferring to regulations promulgated by the Department of Justice.

Despite the ambiguous nature of the ADA's application to state prisoners, the lower court refused to apply the clear statement rule in this case. *Yeskey*, 118 F.3d at 173; JA 130. Instead, the court deferred to regulations promulgated by the Department of Justice, which interpret the ADA as applicable to prisons. *Id.* at 171; JA 127. Such deference is inappropriate when application of an ambiguous federal statute would upset the usual constitutional balance. *See Gregory*, 501 U.S. at 466 (requiring a clear statement of congressional intent in the statutory text, despite the view of two dissenting justices who felt that the Court should have deferred to administrative interpretations of the statute).

As the Fourth Circuit pointed out in *Amos*, the regulations promulgated under the ADA are incredibly intrusive when applied to a traditionally sensitive function such as state prison administration:

Like the byzantine UFAS standards, the ADAAG standards intricately regulate the construction or modification of existing covered facilities and consume 129 pages of the Code of Federal Regulations. *See* 36 C.F.R. pt. 1191, app. A, at 663-792. ADAAG requirements specific to "detention and correctional facilities" address, *inter alia*, specifications for prison visiting areas, medical care facilities, and restrooms; the "dispersion" of "accessible cells" within the correctional facility; accommodations for inmates with

hearing impairments; and the appropriate height of prison beds. *See id.* at 782-84.

Amos, 126 F.3d at 606.

The onerous nature of these regulations should make it obvious that the ADA's application to state prisoners has enormous implications on the balance of power between the federal and state governments. The ADA will force state prison officials to expend limited state funds in accordance with this federal scheme, rather than in accordance with constitutional requirements and state law.

Given the statute's impact on the federal balance, the clear statement rule should be applied — requiring Congress to state, in unmistakable terms, that it is intentionally invading an essential function of state sovereignty. Congress certainly has not done so in the ADA.

E. To avoid an unconstitutional result, the ADA cannot apply to state prisoners.

Significantly, the clear statement rule complements another basic rule of statutory construction: Whenever possible, an act should be interpreted to reach a constitutional result. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *Gregory*, 501 U.S. at 464 ("Application of the plain statement rule thus may avoid a potential constitutional problem."). In our federalist system, application of the ADA to prison management would not be a constitutional result.

In § 12101(b)(4) of the ADA, Congress announced its intent "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). Neither, the Commerce Clause nor the

Fourteenth Amendment gives Congress the power to regulate the management of state prisoners.

1. The Commerce Clause does not authorize federal regulation of state prisons.

The term "commerce" describes "the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons v. Ogden* 22 U.S. (9 Wheat.) 1, 189-90 (1824)). Using its Commerce Clause powers, Congress can regulate three broad areas:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Lopez, 514 U.S. at 558-59 (internal citations omitted). The issue in this case is whether fundamental decisions regarding management of state prisoners substantially affect interstate commerce.⁷ To answer this question, the Court must assess: (1) whether Congress has a rational basis for finding that the regulated activity affects interstate commerce; and (2) if so, whether the means it selected to eliminate the particular evil are reasonable and appropriate. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981);

⁷ Admittedly, some aspects of state prison administration do affect interstate commerce and can be regulated by Congress. *See, e.g.* 18 U.S.C. § 1761(c) (1997) (allowing participants in nearly fifty non-federal pilot projects to sell their goods in interstate commerce if their programs meet certain statutory requirements). Nevertheless, congressional authority to regulate the interstate transportation of commercial goods used or produced in state prisons does not include the authority to regulate each and every aspect of those prisons. *See Lopez*, 514 U.S. at 565-66 (Congress does not have the authority to regulate every aspect of local schools).

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964).

When federal legislation impinges only upon state activities, this Court imposes a more stringent review, focusing on principles of federalism. See *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). This requirement maintains the important distinction between what is truly national and what is of local concern. *Lopez*, 514 U.S. at 567-68. Laws that implement the Commerce Clause, but violate principles of state sovereignty, are acts of usurpation which deserve to be treated as such. *Id.* at 2379. For this reason, the "Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 2383 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). "[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 2384.

Title II of the ADA invades the states' sovereignty by requiring prison administrators to implement a complex and costly regulatory scheme — a practice recently condemned by this Court in *Printz*:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solution with higher taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . .

Printz, 117 S. Ct. at 2382. Public accountability is diminished when "elected state officials cannot regulate in accordance with the views of the local electorate" because state officials may "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions." *New York*, 505 U.S. at 169.

Similarly, if state prison administrators are required to implement the ADA, it will be the states that must shoulder

the costs. The lower court has conceded that prison systems are strapped for funds, and "the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off." *Yeskey*, 118 F.3d at 174; JA 132 (quoting *Crawford*, 115 F.3d at 486). It will be state officials, not the federal government, who will have to take the blame for that outcome.

In the end, if Congress is allowed to regulate the states' sovereign ability to manage their own prisoners, it is difficult to perceive any limitation on federal power in an area where states historically have been sovereign. See *Lopez*, 514 U.S. at 564 (rejecting governmental theories that would allow federal regulation of areas of state sovereignty, such as criminal law enforcement or education).

2. The Fourteenth Amendment does not authorize federal regulation of state prisons.

Just as the Commerce Clause does not give Congress the power to engage in federal regulation of state prison systems, neither does the Fourteenth Amendment. Section 5 of the Fourteenth Amendment gives Congress a broad, but limited, enforcement power. *Gregory*, 501 U.S. at 469. That power is remedial, not substantive, *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997), and it does not override all principles of federalism. *Gregory*, 501 U.S. at 469. It is not always easy to discern the line between measures that remedy or prevent unconstitutional actions and those that make a substantive change in the law, but the distinction exists and must be observed. *City of Boerne*, 117 S. Ct. at 2164.

In *City of Boerne*, this Court struck down the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, because Congress had tried to use its § 5 enforcement power to expand the substantive right to free exercise of religion. Legislation that alters the meaning of a constitutional provision does not "enforce" that provision. *Id.* If Congress could define its own powers by altering the Fourteenth

Amendment's meaning, "it is difficult to conceive of a principle that would limit congressional power." *Id.* at 2168.

Legislation is not appropriate under the Fourteenth Amendment unless it: (1) may be regarded as an enactment to enforce the Equal Protection Clause; (2) is plainly adapted to that end; and (3) is not prohibited by, but is consistent with, "the letter and spirit of the constitution." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). The Court recently explained the analysis this way: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *City of Boerne*, 117 S. Ct. at 2164.

If the ADA encompasses matters of state prison management, it is not proper remedial legislation. In mainstream America, the ADA may represent a "congruence between the means used and the ends to be achieved." *Id.* at 2169. Thus, when applied to services, programs, and activities provided to the public, the statute may be "proportionate to ends legitimate under § 5." *Id.* at 2171. However, the same cannot be said of the ADA if it was intended to apply to state prisoners. Nothing in the legislative history even hints that discrimination against disabled state prisoners is a widespread problem that demands a federal remedy. The legislative history focuses exclusively on the burdens faced by the disabled in public life, not in state prison systems.

Where it has not identified a problem, Congress cannot craft a remedy pursuant to its § 5 enforcement power. It surely cannot expand Fourteenth Amendment protections to create a new substantive right. *Id.* at 2169 (contrasting the voting rights cases to RFRA's legislative record, which lacked examples of purposeful discrimination based on religious bigotry that required remedial measures); see also *The Civil Rights Cases*, 109 U.S. 3, 18 (1883) (explaining that appropriate legislation corrects the effects of offensive state action and provides modes of relief).

As a general rule, states are given wide latitude in classifying individuals for differing types of treatment. *City of*

Cleburne, 473 U.S. at 440. Naturally, that general rule gives way when the differing treatment is based on suspect characteristics such as race, alienage, and national origin because those criteria are rarely relevant to any legitimate state interest. *Id.* Consequently, classifications based on these factors are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.* Similar oversight by the courts is due when state laws impinge on fundamental rights protected by the Constitution. *Id.*

In addition to suspect classes that require strict scrutiny, this Court has designated some less-suspect classes that must receive heightened, but not strict, scrutiny. For example, a gender classification receives "heightened scrutiny" and will not be upheld unless it is substantially related to a "sufficiently important governmental interest." *Id.* at 440-41. Classifications based on illegitimacy receive "somewhat heightened scrutiny," and they must be substantially related to a "legitimate state interest." *Id.* at 441.

In contrast to these suspect classifications, this Court has identified other characteristics — such as age, mental retardation, intelligence, and physical disability — as nonsuspect statuses which are not entitled to heightened review despite differential treatment by state officials. *Id.* at 439, 445-46. In those cases, state legislation or other official action is presumed valid and will be sustained if the classification is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. In the equal protection analysis, rational-basis review does not give the courts license to judge the wisdom, fairness, or logic of state policy decisions. See *Heller v. Doe*, 509 U.S. 312, 319 (1993). A classification must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and a state has no obligation to produce evidence to sustain the rationality of its decision. *Id.* at 320 (quoting *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

Significantly, this Court has already decided that equal protection scrutiny will "not be so demanding where we deal

with matters resting firmly within a State's constitutional prerogatives." *Gregory*, 501 U.S. at 469.⁸ Therefore, even when the highest level of scrutiny would otherwise apply, prison regulations are valid as long as they bear a reasonable relationship to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1989) (refusing to apply a heightened, "less restrictive alternative" standard in upholding prison regulation that adversely affected prisoners' ability to attend important religious service). When prisoners are classified based on non-suspect criteria, such as an inmate's physical or mental disabilities, deference should be paid to that administrative decision unless it lacks any rational basis. See *City of Cleburne*, 473 U.S. at 445-46 (noting that disability is a nonsuspect status); *Gregory*, 501 U.S. at 470-71 (noting that where a classification burdens neither a suspect group nor a fundamental interest, the state need only assert a rational basis for its classification because "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws").

Once this Court has determined the requisite level of equal protection scrutiny, Congress does not have the power to heighten that requirement. *City of Boerne*, 117 S. Ct. at 2172 (finding it unconstitutional for Congress to pass legislation raising the level of scrutiny required by this Court's prior precedent). This Court has already determined the appropriate level of equal protection scrutiny in the prison setting, and

⁸ In *Gregory*, this Court pointed to Tenth Amendment limitations on Congress's § 5 enforcement power in a series of cases that included *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); and *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). *Gregory*, 501 U.S. at 461-63. Those cases concerned the state's power to define the qualifications of "competitive civil service workers" (*Sugarman*), state troopers (*Foley*), public schoolteachers (*Ambach*), and deputy probation officers (*Cabell*). In each case, aliens challenged the state statutes, which denied them employment in those particular fields. Only the statute in *Sugarman* was struck down because it was a blanket prohibition on a broad category of public jobs; it "swe[pt] indiscriminately" and was "neither narrowly confined nor precise in its application." *Sugarman*, 413 U.S. at 643.

Congress does not have the power to change that standard. The ADA simply cannot be applied to state prisons without altering the level of scrutiny afforded to prisoners' equal protection claims.

The ADA does not merely prohibit "discrimination" against disabled prisoners. It will require prison officials to grant special privileges to certain inmates and to excuse others from complying with generally-applicable prison rules. See, e.g., *Purcell v. Pennsylvania Dep't of Corrections*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, *1, *22 (E.D. Pa. Jan. 9, 1998) (inmate with Tourette's syndrome stated a claim under the ADA where he received a misconduct write-up for refusing to report for a medical appointment because he needed to return to his cell and privately "explode" his built-up motor and verbal tics). The sweeping intrusions of the ADA and its regulations will profoundly affect sound prison management. The states will be required to expend substantial financial resources to meet the ADA's regulatory schemes, and they will lose the ability to balance internal security with operational and fiscal concerns.

For example, prison officials will be prohibited from denying a disabled inmate "the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2). Arguably, the state could not cluster specialized services for its disabled prisoners in certain prison facilities so as to provide these services in an efficient and cost-effective manner. The state may very well have to make mental health treatment centers, services for hearing-impaired inmates, dialysis treatment, and the like available at every facility. Even prison regulations that are intended to benefit disabled inmates could run afoul of the ADA. Segregating disabled inmates from the general population to protect them from bigger, more violent, and manipulative inmates might subject prison officials to a searching judicial inquiry into alternative ways of including the disabled in the general population.

If the ADA applies to prisons, the decisions of state officials will not be given the deference due them under prior precedent of this Court. Instead, state officials will have to prove that a particular administrative decision was not only reasonable, but that it was the only choice which would not cause them undue hardship or fundamentally alter their programs and services. See 28 C.F.R. § 35.150(3) (stating that a public entity has the burden of proving that it cannot operate its services, programs, or activities in an accessible manner without (1) fundamentally altering the nature of that service, program or activity, or (2) incurring undue financial and administrative burdens). Prison officials will have to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless the officials demonstrate that "making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7). See also *Crawford*, 115 F.3d at 483 (noting that prison officials can exclude prisoners from programs and activities if they can show that there is no reasonable accommodation that would enable the disabled prisoner to participate in the programs and activities in question or that making the necessary accommodation would place an undue burden on the prison system); *Yeskey*, 118 F.3d at 174; JA 132 (agreeing with *Crawford* that prison officials may not exclude a disabled person from the dining hall unless it would place an undue burden on prison management).

By placing this burden of proof on state officials, the federal government comes very close to requiring states to meet the "least restrictive means" test. This Court has refused to impose that kind of burden on prison officials, even where prison regulations have infringed on fundamental constitutional rights. *Turner*, 482 U.S. at 90. Prison regulations are considered valid if they are reasonably related to legitimate penological interests:

This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of

accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. (internal citation omitted). Requiring state officials to accommodate prisoners' rights at a *de minimis* cost to valid penological interests is a far cry from requiring accommodation unless state officials can affirmatively prove an undue burden on prison administration or a fundamental alteration of programs, services, and activities. Compare *O'Lone*, 482 U.S. at 350 (refusing to burden prison officials with disproving the availability of alternative methods of accommodating the prisoners' demands even though prison work rules prevented some inmates from attending religious services that were central to their beliefs); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (holding that burden was not on prison officials to affirmatively establish that a prisoners' union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order").

The case before this Court vividly demonstrates why application of the ADA to prisoners would create substantive rights that greatly exceed constitutional requirements. Under federal law, a prisoner has no right to compel confinement in any particular institution or participation in any particular program. See *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (prisoner has no right to be housed in a particular institution); *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (no entitlement to participation in rehabilitative program). Similarly, under Pennsylvania law, an inmate has no right to participate in the Department's motivational boot camp. Pa. Stat. Ann. tit. 61, § 1126. Here, *Yeskey* claims that he was denied participation in the boot camp because of his "disability." Consequently, the ADA could grant him the legal right to that placement unless Pennsylvania can affirmatively prove that its boot camp can-

not be modified to accommodate Yeskey's hypertension without fundamentally altering the key elements of that program.

If the ADA is applied in the prison context, it will create substantive rights that greatly exceed the prisoners' constitutional rights, and the act will suffer from many of the same fatal flaws as RFRA, the statute struck down in *City of Boerne*. Both statutes place the burden on state officials to establish why a proposed change in their practice, rule, procedure, or policy would harm some other important state interest. In RFRA, the state officials were required to show that the proposed accommodation would harm a "compelling state interest," and that the state's action was the "least intrusive means" for protecting that compelling interest. Similarly, the ADA would require state prison officials to affirmatively prove that any proposed modification would adversely affect a fundamental aspect of the state program or cause an undue burden on the state — a test which closely parallels the "least restrictive means" standard.

In sum, the ADA simply cannot be applied to prisons without being "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 117 S. Ct. at 2170. "It appears, instead, to attempt a substantive change in constitutional protections." *Id.* This is something Congress cannot do.

CONCLUSION

"The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *Lopez*, 514 U.S. at 562 (quoting *United States v. Five Gambling Devices Etc.*, 346 U.S. 441, 448 (1953)(plurality opinion)). The clear statement rule can be used to avoid a statutory interpretation that would affect the normal federal-state balance of power. See *Gregory*, 501 U.S. at 464 ("Application of the plain statement rule thus may avoid a potential constitutional problem.").

As in *Gregory*, all of the difficult constitutional concerns discussed above can be avoided by reasonable application of the clear statement rule. Whether the ADA applies to state prisons is ambiguous at best. "In the face of such an ambiguity," this Court "will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Gregory*, 501 U.S. at 469. Because Congress has not clearly manifested an intent to apply the ADA to state prisoners, the act must be interpreted to exclude them from its scope.

For these reasons, petitioners respectfully ask this Court to reverse the decision of the United States Court of Appeals for the Third Circuit and remand with instructions to affirm the judgment entered on April 9, 1996, by the United States District Court for the Middle District of Pennsylvania, which dismissed this action in its entirety.

Respectfully submitted,

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(Counsel of Record)

SYNDI L. GUIDO
Deputy General Counsel

Office of General Counsel
333 Market Street
17th Floor
Harrisburg, PA 17101
(717) 783-6563

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Counsel for Petitioners

APPENDIX

AMERICANS WITH DISABILITIES ACT OF 1990
42 U.S.C. §§ 12101 — 12102; 12131 — 12134 (1994)

§ 12101. Findings and purpose

(a) Findings. The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this chapter —

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services. The term “auxiliary aids and services” includes —

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term “disability” means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER II — PUBLIC SERVICES

PART A — PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definition

As used in this subchapter:

(1) Public entity. The term “public entity” means —

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability. The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) **In general.** Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) **Relationship to other regulations.** Except for “program accessibility, existing facilities”, and “communications”, regulations under subsection (a) shall be consistent with this chapter and with the coordination regulations under part 41 of

title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to “program accessibility, existing facilities”, and “communications”, such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) **Standards.** Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

REHABILITATION ACT OF 1973 **29 U.S.C. §§ 701, 794 (1994)**

§ 701. Findings; purpose; policy

(a) **Findings.** Congress finds that —

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to —

- (A) live independently;
- (B) enjoy self-determination;
- (C) make choices;
- (D) contribute to society;
- (E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through the provision of individualized training, independent living services, educational and support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to —

- (A) make informed choices and decisions; and
- (B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose. The purposes of this chapter are —

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through —

- (A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;
- (B) independent living centers and services;
- (C) research;
- (D) training;
- (E) demonstration projects; and
- (F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with

disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(c) Policy. It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of —

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of a parent, a family member, a guardian, an advocate, or an authorized representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regu-

lation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of —

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship —

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) of this sec-

tion to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

PENNSYLVANIA'S MOTIVATIONAL BOOT CAMP ACT

18 Pa. Stat. Ann. tit. 61, §§ 1121-1129 (West Supp. 1997)

§ 1121. Short title

This act shall be known and may be cited as the Motivational Boot Camp Act.

§ 1122. Declaration of policy

The General Assembly finds and declares as follows:

(1) The Commonwealth recognizes the severe problem of overcrowding in State and county prisons and understands that overcrowding is a causative factor contributing to insurrection and prison rioting.

(2) The Commonwealth also recognizes that the frequency of convictions responsible for the dramatic expansion of the prison population is attributable in part to the increased use of drugs and alcohol.

(3) The Commonwealth, in wishing to salvage the contributions and dedicated work which its displaced citizens may

someday offer, is seeking to explore alternative methods of incarceration which might serve as the catalyst for reducing criminal behavior.

§ 1123. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Commission." The Pennsylvania Commission on Sentencing.

"Department." The Department of Corrections of the Commonwealth.

"Eligible inmate." A person sentenced to a term of confinement under the jurisdiction of the Department of Corrections who is serving a term of confinement, the minimum of which is not more than two years and the maximum of which is five years or less or an inmate who is serving a term of confinement the minimum of which is not more than three years where that inmate is within two years of completing his minimum term, and who has not reached 35 years of age at the time he is approved for participation in the motivational boot camp program. The term shall not include any inmate who is subject to a sentence the calculation of which included an enhancement for the use of a deadly weapon as defined pursuant to the sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing or any inmate serving a sentence for any violation of one or more of the following provisions:

18 Pa.C.S. § 2502 (relating to murder).

18 Pa.C.S. § 2503 (relating to voluntary manslaughter).

18 Pa.C.S. § 2506 (relating to drug delivery resulting in death).

18 Pa.C.S. § 2901 (relating to kidnapping).

18 Pa.C.S. § 3121 (relating to rape).

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S. § 3124.1 (relating to sexual assault).

18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

18 Pa.C.S. § 3301(a)(1)(i) (relating to arson and related offenses).

18 Pa.C.S. § 3502 (relating to burglary) in the case of burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present.

18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).

18 Pa.C.S. § 3702 (relating to robbery of motor vehicle).

18 Pa.C.S. § 7508 (a)(1)(iii), (a)(2)(iii), (a)(3)(iii) or (a)(4)(iii) (relating to drug trafficking sentencing and penalties).

"Motivational boot camp." A program in which eligible inmates participate for a period of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, ventilation therapy, continuing education, vocational training and prerelease counseling.

"Secretary." The Secretary of Corrections of the Commonwealth.

§ 1124. Selection of inmate participants

(a) Duties of commission.—Through the use of sentencing guidelines, the commission shall employ the definition of "eligible inmate" as provided in this act to further identify inmates who would be appropriate for participation in a motivational boot camp.

(b) Duties of sentencing judge.—The sentencing judge shall employ the sentencing guidelines to identify those defendants who are eligible for participation in a motivational boot camp. The judge shall have the discretion to exclude a defendant from eligibility if the judge determines that the defendant would be inappropriate for placement in a motivational boot

camp. The judge shall note on the sentencing order whether the defendant has been identified as eligible for a motivational boot camp program.

(c) Duties of department.—The secretary shall promulgate rules and regulations providing for inmate selection criteria and the establishment of motivational boot camp selection committees within each diagnostic and classification center of the department.

§ 1125. Establishment of motivational boot camp program

(a) Establishment.—There is hereby established in the department a motivational boot camp program.

(b) Program objectives.—The objectives of the program are:

(1) To protect the health and safety of the Commonwealth by providing a program which will reduce recidivism and promote characteristics of good citizenship among eligible inmates.

(2) To divert inmates who ordinarily would be sentenced to traditional forms of confinement under the custody of the department to motivational boot camps.

(3) To provide discipline and structure to the lives of eligible inmates and to promote these qualities in the postrelease behavior of eligible inmates.

(c) Rules and regulations.—The secretary shall have the duty to promulgate rules and regulations which shall include, but not be limited to, inmate discipline, selection criteria, programming and supervision, and administration. The department shall provide four weeks of intensive training for all staff prior to the start of their involvement with the program.

(d) Approval.—Motivational boot camp programs may be established only at correctional facilities classified by the secretary as motivational boot camp facilities.

(e) Evaluation.—The department and the commission shall monitor and evaluate the motivational boot camp pro-

grams to ensure that the programmatic objectives are met. Both shall present annual reports of the evaluations of the Judiciary Committees of the House of Representatives and Senate no later than February 1 of each year.

§ 1126. Procedure for selection of participant in motivational boot camp program

(a) Application.—An eligible inmate may make an application to the motivational boot camp selection committee for permission to participate in the motivational boot camp program.

(b) Selection.—If the selection committee determines that an inmate's participation in the program is consistent with the safety of the community, the welfare of the applicant, the programmatic objectives and the rules and regulations of the department, the committee shall forward the application to the secretary or his designee for approval or disapproval.

(c) Conditions.—Applicants may not participate in the motivational boot camp program unless they agree to be bound by all the terms and conditions thereof and indicate their agreement by signing a memorandum of understanding.

(d) Qualifications to participate.—Satisfying the above qualifications to participate does not mean the inmates will automatically be permitted to participate in the program.

(e) Expulsion from program.—The inmate's participation in the motivational boot camp unit may be suspended or revoked for administrative or disciplinary reasons. The department shall develop regulations consistent herein.

§ 1127. Completion of motivational boot camp program

Upon certification by the department of the inmate's successful completion of the program, the Pennsylvania Board of Probation and Parole shall immediately release the inmate on parole, notwithstanding any minimum sentence imposed in the case. The parolee will be subject to intensive supervision for a period of time determined by the board, after which he will be

subject to the usual parole supervision. For all other purposes, the parole of the inmate shall be as provided by the act of August 6, 1941 (P. L. 861, No. 323), referred to as the Pennsylvania Board of Probation and Parole Law.¹

§ 1128. Appeals

Nothing in this act shall be construed to enlarge or limit the right of an inmate to appeal his or her sentence.

§ 1129. Repeals

All acts and parts of acts are repealed insofar as they are inconsistent with this act.

¹ 61 P.S. § 331.1 et seq.

CODE OF FEDERAL REGULATIONS TITLE 28-JUDICIAL ADMINISTRATION CHAPTER I-DEPARTMENT OF JUSTICE PART 35-NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

SUBPART B-GENERAL REQUIREMENTS

Current through February 9, 1998; 63 FR 6614

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant

assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections —

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

SUBPART D — PROGRAM ACCESSIBILITY

Current through February 9, 1998; 63 FR 6614

§ 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not —

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or

would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods —

(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required

because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

- (i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;
- (ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or
- (iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan.

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum —

- (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

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CLERK

No. 97-634

(13)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

EVE H. CERVANTEZ
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center,
7th Floor
San Francisco, CA 94111
Telephone: 415/434-1600
Facsimile: 415/399-3041

DONALD SPECTER
Counsel of Record
PRISON LAW OFFICE
General Delivery
San Quentin, CA 94964
Telephone: 415/457-9144
Facsimile: 415/457-9151

Attorneys for Respondent Ronald R. Yeskey

[Additional counsel listed on inside cover]

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97 pp

ARLENE B. MAYERSON
DISABILITY RIGHTS
EDUCATION AND
DEFENSE FUND, INC.
2212 6th Street
Berkeley, CA 94710
Telephone: 510/644-2555

JOHN V. WADSWORTH
MCCUTCHEN, DOYLE, BROWN
& ENERSEN, LLP
Three Embarcadero Center
San Francisco, CA 94111
Telephone: 415/393-2000

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QUESTION PRESENTED

Whether Congress intended the Americans with Disabilities Act, which prohibits any and all state agencies from discriminating against disabled individuals, to apply to state prisoners?

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CONSTITUTIONAL, STATUTORY, AND
REGULATORY PROVISIONS INVOLVED

In addition to the constitutional, statutory, and regulatory provisions set out in the Brief for Petitioners, the following statutory and regulatory provisions are also involved, and are set forth verbatim in the appendix to this brief.

Portions of the Americans with Disabilities Act, specifically 42 U.S.C. §§12111, 12201, 12202, 12208, and 12210, are set forth verbatim in the appendix at A1-A4.

The Department of Justice regulations implementing the ADA are set forth at Part 35 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §§35.104, 35.149, 35.151, 35.164, 35.190, and excerpts from Appendix A are set forth verbatim in the appendix at A5-A11.

The Department of Justice regulations implementing Section 504 of the Rehabilitation Act of 1973 with respect to Activities Conducted By The Department of Justice are set forth at Part 39 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §§39.150, 39.170, and excerpts from the Editorial Note are set forth verbatim in the appendix at A11-A16.

The Department of Justice coordination regulations implementing Section 504 of the Rehabilitation Act of 1973 with respect to Federally Assisted Programs are set forth at Part 41 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §41.4 is set forth verbatim in the appendix at A16-A17.

The Department of Justice regulations implementing Section 504 of the Rehabilitation Act of 1973 with respect to Federally Assisted Programs are set forth at Part 42 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §§42.522 and 42.540 are set forth verbatim in the appendix at A17-A18. The Department of Justice analysis of these regulations is set forth at Volume 45, No. 108 of the Federal

Register. Excerpts from the Federal Register are set forth verbatim in the appendix at A24-A27.

The Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities, are set forth at Part 1191 of Title 36 of the Code of Federal Regulations, published at 63 Fed. Reg. 2000 (Jan. 13, 1998). Section 12, Detention and Correctional Facilities, is set forth verbatim in the appendix at A19-A23.

The Uniform Federal Accessibility Standards are set forth at Appendix A to subpart 101-19.6 of Title 41 of the Code of Federal Regulations. An excerpt from Section 4.1.4 is set forth verbatim in the appendix at A23-A24.

STATEMENT OF THE CASE

Respondent Ronald R. Yeskey was originally sentenced to serve eighteen to thirty-six months in state prison, but the sentencing court recommended that Yeskey instead be placed in the Motivational Boot Camp Program ("Boot Camp") for youthful, non-violent offenders. JA 6 (Complaint) ¶¶9-10.¹ Participants in the Boot Camp are released on parole after just six months and receive the benefits of substance abuse treatment, continuing education, vocational training, work experience on public projects, and pre-release counseling. *Id.* ¶10; PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997).

Despite the sentencing court's recommendation, Petitioner Department of Corrections refused to let Yeskey participate in the program "due to a medical history of hypertension (on medication)." JA 6 ¶11. Petitioners refused to reconsider this decision, and Yeskey therefore spent over a year longer in prison and was denied the

¹Because Yeskey's case was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint must be taken as true for purposes of this appeal. See *Albright v. Oliver*, 510 U.S. 266, 268, 127 L. Ed. 2d 114, 120 (1994) (plurality opinion).

benefits of the boot camp program because of his disability. *Id.* ¶¶10, 12, 17.

Yeskey brought this suit under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12131 *et seq.*, seeking both money damages and injunctive relief.² JA 10-11 ¶c. Petitioners moved to dismiss under Rule 12(b)(6), arguing that (1) Yeskey had no protected right to a particular custody status, (2) he was not an "otherwise qualified individual" because he could not meet the Boot Camp's requirement of "rigorous physical activity"³ and (3) the ADA did not apply to prison inmates. The District Court held that the ADA does not apply to state prison inmates and dismissed the entire action. JA 95. No constitutional issue was raised or decided.

The Third Circuit reversed. Based on the "plain words of [the] statute," as well as the "weight of judicial authority" and the Department of Justice ("DOJ") regulations implementing the statute, the Court held that the ADA applies to state prison inmates. *Yeskey v. Pennsylvania Dep't of*

²Although Yeskey has been released from prison, his request for an injunction is not moot, because this is a wrong capable of repetition yet evading review. See *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170 n.3 (3d Cir. 1997), *petition for cert. granted*, 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-634).

³This Court must assume that Yeskey is "qualified," because he has alleged as much. JA 7 ¶14. On remand, Yeskey will be entitled to prove, on summary judgment or at trial, either that (1) he is capable of performing "vigorous physical activity" without risk to his health and therefore needs no accommodation or change in policy to permit his participation; or (2) that Petitioner could make some reasonable change to its policies, which only require one hour of calisthenics at the beginning of a full day of work, educational and vocational training and substance abuse treatment. See excerpt from COMMONWEALTH OF PENNSYLVANIA, DEPT. OF CORRECTIONS, QUEHANNA BOOT CAMP INMATE HANDBOOK, reprinted in Appendix at A29-A33. (This Court may take judicial notice of the existence of the handbook. FED. R. EVID. 201(b)(2).) Petitioner may then articulate some legitimate non-discriminatory reason for excluding Yeskey, or demonstrate that any proposed modification of its policies would alter the purpose of the boot camp program.

Corrections, 118 F.3d 168, 170-74 (3d Cir. 1997), petition for cert. granted, 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-634). Again, no constitutional issue was raised or decided.

SUMMARY OF ARGUMENT

Congress found and Petitioners concede that discrimination against people with disabilities pervades nearly every aspect of our society. Completely absent from Petitioners' argument is any suggestion that this noxious form of discrimination does not infect state prisons. Although Petitioners agree that the ADA represents an appropriate exercise of congressional authority to eliminate discrimination for the rest of society, they contend that the ADA should never be applied to any prisoner who has suffered discrimination on the basis of disability, under any circumstance, in any state prison. That is not the law. There is no "state prisoner exception" to the ADA, and the Court should not create one.

The plain words of the ADA provide universal protection against discrimination to *all* individuals with disabilities who participate in programs of "any State or local government" or "any department, agency . . . or other instrumentality of a State" 42 U.S.C. §12131(1) (emphasis added). Congress confirmed that prisoners are covered by incorporating into the ADA federal regulations implementing Section 504 of the Rehabilitation Act, which explicitly cover prisoners. The legislative history of the ADA and other relevant statutes also shows that discrimination against prisoners was one of the specific problems Congress considered before it enacted the statute.

Petitioners cannot avoid the unambiguous terms of the ADA; instead, they distort the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Petitioners' implicit claim that *Gregory* requires that traditional state functions be enumerated in the text of the statute proves too much. There is no principled way to distinguish between managing prisoners and the myriad other state functions that are both traditional and essential, which Petitioners

concede are covered under the ADA. Under Petitioners' argument, the ADA would not apply to any traditional state function unless that function was specifically mentioned, which would result in excluding not only prisoners, but prison employees and visitors, police officers, school children, victims of crime, judges, institutionalized persons and countless others with disabilities.

This absurd result is not necessary. Petitioners' argument misconstrues the clear statement rule. First, *Gregory* held that Congress need not list every sovereign state function, but need only make its intention "clear." Second, the Court required a clear statement only when Congress intended to regulate state functions going to the heart of state sovereignty; it did not require a clear statement when Congress intended to regulate functions, like managing prisons and schools, traditionally performed by the states.

Petitioners really are making a policy argument: that the ADA might interfere with their discretion to maintain security. Not only is their argument only cognizable by Congress, but it is not supported by the facts, which are nothing more than imagined scenarios that are not before this or any other Court.

In fact, applying the ADA to state prisoners will not interfere with the management of state prisons. Petitioners concede that the ADA applies to prison employees and visitors. Section 504 of the Rehabilitation Act has been applied to state prisoners by federal regulation and court decisions for almost two decades. Congress imported the same regulatory standards into the ADA, thereby providing sufficient flexibility to operate prisons, and any other state program, safely and with due concern for legitimate security interests. Specifically, the ADA does not require prison officials to modify programs if doing so will create a significant risk of harm to others, impose an undue financial or administrative burden, or fundamentally alter the nature of the states' programs.

Petitioners' constitutional arguments were neither made nor decided below, and the Court should not (and need not) address them. They are also without merit. First, the Court has held that prisoners retain their right to be free of discrimination. The ADA is as congruent with the Fourteenth Amendment within prison as Petitioners concede it is outside the prison walls. Because its remedies are designed to accommodate the interests of the states according to the particular factual setting, the ADA also is as proportional a remedy to prevent future discrimination in prison as Petitioners concede it is in the free world. The ADA therefore is an appropriate exercise of Congress's remedial powers to prevent future unconstitutional discrimination under Section 5 of the Fourteenth Amendment. Second, Petitioners' other concession—that certain aspects of prisons substantially affect interstate commerce—is fatal to their Commerce Clause argument since Congress may ban discrimination in prison as part of its regulation of a larger class of activities. Finally, since the ADA does not “commandeer” state officials and press them into federal service, the statute does no harm to the principles of federalism.

The central purpose of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. §12101(b)(1). The ADA does nothing more than permit prisoners with disabilities access to the same programs, services and activities as non-disabled prisoners. This unremarkable result was intended by Congress and is sanctioned by the Constitution.

ARGUMENT

I.

INTRODUCTION

Congress enacted the ADA after twenty years of experience with six other disability discrimination statutes demonstrated that a comprehensive remedy was necessary.

See H.R. REP. NO. 101-485(II), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 330; S. REP. NO. 101-116, at 19. Congress based the ADA on two years of work and on a vast amount of information from numerous sources, including fourteen congressional hearings, polling data on society's attitudes toward the disabled, a report from the U.S. Commission on Civil Rights, and seven other substantive studies or reports, one of which compiled the testimony from seventy-seven public hearings in all fifty states and the District of Columbia. See *Coolbaugh v. Louisiana*, –F.3d–, No. 96-30664, 1998 WL 84123, at *6-*8 (5th Cir. Feb. 27, 1998) (listing hearings and studies).⁴ These studies and testimony specifically addressed disability discrimination against prisoners. See Part II(C)(2), *infra*.

Congress also made detailed findings about the pervasiveness of disability discrimination throughout American society. 42 U.S.C. §12101(a). Congress found that persons with disabilities have been subjected to a history of unequal treatment, that such discrimination persists in critical areas of society, including institutionalization and access to public services and that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” *Id.*

These amply supported findings demanded a direct and thorough federal response, forbidding disability discrimination in all aspects of society, including employment decisions, government services, public transportation, telecommunications, and public accommodations. Congress

⁴See also Brief of Amici Curiae the National Advisory Group for Justice, et al., which contains an extensive discussion of the legislative history of the ADA and its precursor statutes.

enacted the ADA to establish a "clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities" and to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. §12101(b) (emphasis added).

Congress specifically concluded that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which prohibits disability discrimination by public agencies that receive federal funds, was insufficient. It enacted Title II of the ADA to expand the scope of coverage of the Rehabilitation Act and its implementing regulations and specifically incorporated the Rehabilitation Act standards and regulations into Title II to assure that all operations of state and local governments would be accessible to persons with disabilities in a non-discriminatory manner. See 42 U.S.C. §§12201(a), 12134(b); H.R. REP. NO. 101-485(II), at 47-48, 184 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329-30, 366; H.R. REP. NO. 101-485(III), at 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 492. These Rehabilitation Act regulations have always applied to state prisoners. See Part II(C)(1), *infra*.

The ADA's broad non-discrimination mandate requires guidelines that apply in a wide variety of factual circumstances, with due respect for state interests and policy choices. For that reason, the ADA's implementing regulations, modeled after Rehabilitation Act regulations and this Court's interpretations of them, are broad and flexible to balance the needs of people with disabilities and the legitimate interests of local and state governments.

Thus, the regulations require only *reasonable* modifications that neither "result in a fundamental alteration" of a program nor create an "undue financial or administrative burden[]." 28 C.F.R. §35.150(a)(3) (emphasis added); *see also id.* §35.130(b)(7); *id.* pt. 35, App. A at 477, 483 (regulations codify holding in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). Nor do the regulations require a public agency to take any action that poses a significant risk

to the health or safety of others. 28 C.F.R. §35.104; *id.* pt. 35, App. A at 472 (DOJ Analysis of §35.104; codifying *School Board v. Arline*, 480 U.S. 273, 287 (1987))⁵; *see also* 28 C.F.R. §36.104.⁶ Indeed, recognizing the special challenges posed by architectural access in prisons, the ADA Accessibility Guidelines ("ADAAG") contain several prison-specific exceptions, most promulgated in response to comments from *prison administrators*.⁷

The ADA is a flexible statute that respects legitimate penological and security concerns. Moreover, the requirements of Title II have been applied in this manner to state prisoners for almost two decades under Section 504. *See infra*, Parts II(C)(1)-(2).

⁵See H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457; S. REP. NO. 101-116, at 27, 40.

⁶Moreover, a public entity is not required to make any structural changes in existing facilities where other methods effectively permit individuals with disabilities access to a public program, when the program is "viewed in its entirety." 28 C.F.R. §35.150(a), (b)(1); *id.* pt. 35, App. A at 484 (structural changes in existing facilities not required unless no other "feasible way to make . . . program accessible").

⁷See, e.g., 63 Fed. Reg. 2046-47 (ADAAG 12.1 (elevators), 12.2.1, 12.5.2 (entrances need not comply "where security requirements prohibit full compliance"), 12.4.2 (grab bars not required in suicide prevention cells)). ADAAG is set forth at Part 1191 of Title 36 of the Code of Federal Regulations, and the final rule for Detention and Correctional Facilities is published at 63 Fed. Reg. 2000 (Jan. 13, 1998). The views of state prison officials from 44 states were submitted to the Architectural and Transportation Barriers Compliance Board, which adopted many of their suggestions. See 59 Fed. Reg. 31,676; 31,681; 31,687; 31,697-31,711.

II.

**TITLE II OF THE ADA PROTECTS STATE
PRISONERS FROM DISCRIMINATION ON THE BASIS
OF DISABILITY.**

A. Title II Of The ADA Unambiguously Covers State Prisoners.

Because the plain language of the ADA unambiguously applies to all state entities, including prisons, there is no basis to carve out an exception for state prison inmates. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Title II of the ADA is explicitly universal in scope. It prohibits discrimination by "public entities," defined as "(A) *any* State or local government; (B) *any* department, agency, special purpose district, or other instrumentality of a State or States or local government" 42 U.S.C. §12131(1) (emphasis added).⁸ This language—*any* state agency or department—cannot possibly be read to exempt state prisons. Conceding this,⁹ Petitioners still argue that the statute can be read to exempt prison inmates.

Not surprisingly, given the lack of ambiguity in the statutory language, Petitioners' argument below was quite different. Rather than contend that the ADA is ambiguous, they argued: "The plain meaning of a statute should not be automatically followed where it 'will produce a result

⁸See also 42 U.S.C. §12202 (abrogating States' Eleventh Amendment immunity).

⁹In their brief to the Third Circuit, Petitioners stated, "Appellees do not argue that all aspects of a correctional facility are immune from application of the ADA. Certainly, the ADA would be applicable to employment of staff and access to buildings open to the public such as general administration areas or visiting areas." JA 114 n.8. They have not retreated from this position.

demonstrably at odds with the intention of the drafters.'" JA 116 (citation omitted).

Here, Petitioners, relying on *Amos v. Maryland Department of Public Safety & Correctional Services*, 126 F.3d 589 (4th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113), attempt to manufacture a "state prisoner" exception to the ADA by ignoring the statutory definitions and ordinary meanings of various statutory terms, none of which is ambiguous. See Brief for the Petitioners ("Pet. Brf.") at 19-20. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. This Section explicitly covers all of the operations of a public agency, including the boot camp operated by the state department of corrections here.

First, Petitioners argue that the terms "program and activity" are undefined and ambiguous. Pet. Brf. 12. Both assertions are incorrect. The term "program or activity" is statutorily defined in Section 504 to encompass "*all of the operations of—*(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government" (29 U.S.C. §794(b)(1) (emphasis added)) and Congress has directed that the ADA be interpreted in congruence with Section 504. 42 U.S.C. §§12133, 12134, 12201(a).¹⁰ "It is hard to imagine how state correctional programs would not fall within this broad definition." *Yeskey*, 118 F.3d at 170.¹¹ Indeed, and contrary to the

¹⁰As discussed *infra*, Parts II(C)(1)-(2), Section 504 has consistently been applied to state prison inmates.

¹¹A statutory term "must be given its 'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. 137, 145, 133 L. Ed. 2d 472, 481 (1995):

"Activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of "an

(continued...)

Fourth Circuit's surmise that "most prison officials would be surprised to learn that they were required . . . to provide inmates with 'services,' 'programs,' or 'activities' as those terms are ordinarily understood" (*Amos*, 126 F.3d at 601 (some internal quotation marks omitted)), Petitioners themselves frequently refer to "program" or "activity" when discussing state prisons. See, e.g., Pet. Brf. 31-32 (referring to boot camp as "program"). This is unsurprising, as the Pennsylvania statute itself refers to the Boot Camp from which Yeskey was excluded as a "program" that provides "services." PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997). Moreover, the ADA does not apply only to "services, programs, or activities"; in its second clause it affirmatively forbids a public entity from subjecting people with disabilities to discrimination generally. 42 U.S.C. §12132.

Second, Petitioners argue that the term "qualified individual with a disability" is ambiguous because it implies voluntariness and therefore excludes prisoners. The ADA defines a "qualified individual with a disability" as

an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. (42 U.S.C. §12131(2))

Nothing in this definition excludes prisoners. The terms "eligible" and "participate" do not "imply voluntariness on the part of an applicant who seeks a benefit from the state." Cf. Pet. Brf. 20. As the Third Circuit held, "the term

¹¹(...continued)

organizational unit for performing a specific function." *Webster's Third New International Dictionary* 22 (1986). "Program" is defined as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. Certainly, operating a prison facility falls within the "duties or functions" of local government authorities. (*Yeskey*, 118 F.3d at 170)

'eligibility' simply describes those who are 'fitted or qualified to be chosen,' without regard to their own wishes. See *Webster's Third New International Dictionary*, *supra* at 736." *Yeskey*, 118 F.3d at 173. And, as the dissenting judge in *Amos* correctly noted,

The "voluntary" limitation that the majority opinion imposes would immunize discrimination on the basis of disability in the provision of compulsory services such as public education, mandatory vaccinations, and jury service. Yet several courts, including the Fourth Circuit, have indeed applied the statutes to such mandatory and "involuntary" programs. (*Amos*, 126 F.3d at 615 (Murnaghan, J., dissenting))

Indeed, Petitioners concede that the ADA applies to institutionalization. Pet. Brf. 17. Prison is similar to other institutions; although an inmate does not choose to go to prison, once there he is eligible to receive certain services from the state such as food and medical care merely because he is an inmate. On the other hand, prison inmates are commonly subject to "eligibility" requirements to receive certain prison programs, services, or activities. For example, the statutory definition of the Boot Camp from which Yeskey was excluded is "[a] program in which *eligible* inmates *participate* for a period of six months in a humane program for motivational boot camp" PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997) (emphasis added). The statute specifically defines "eligible inmate"¹² and provides that sentencing judges should identify "those defendants who are eligible for participation in a motivational boot camp" (*id.* §1124), as the judge did in this instance. Having met the eligibility requirements, Yeskey sought only to be free of discrimination based on disability.¹³

¹²An eligible inmate is a person under the age of 35 serving a relatively short term (two to five years) for a non-violent offense. See PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997).

¹³Yeskey pled that he was qualified to participate in Boot Camp (JA (continued...))

Third, Petitioners argue that the title "public services" excludes state prisoners, because prisons are not open to the public. As discussed above, the term "public entity" is statutorily defined to include "any" State agency or department—not just those open to the "general public."¹⁴ Normal rules of statutory construction require that a common term occurring in several places within a statute be given a single meaning. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 283 (1993). Thus, the term "public services" cannot be reinterpreted to mean only those services open to the general public, when the statute defines "public entity" to mean *any* state agency. Indeed, many services provided by public entities are not available to the public at large, but only to those who meet certain selection criteria: involuntary commitment to a mental hospital, drug treatment facilities, jury duty, even public education.

Finally, Petitioners argue that the statutory goals of the ADA—"to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" so that people with disabilities can "pursue those opportunities for which our free society is justifiably famous"¹⁵—are incompatible with the Act's application to prison inmates. But the ADA's goals mirror the goals of the Boot Camp, which was created because of the State's desire "to salvage the contributions and dedicated work which its displaced citizens may someday offer." PA. STAT. ANN. tit. 61, §1122 (West Supp. 1997). The statutory objectives of the Boot Camp are to prepare prisoners to be productive members of free

¹³(...continued)

7 §14), which must be assumed to be true on this denial of a motion to dismiss.

¹⁴This is in accord with the common understanding of "public entity" as an agency operated by the government, rather than by the private sector. See, e.g., *Richardson v. McKnight*, —U.S.—, 138 L. Ed. 2d 540, 557 (1997) (Scalia, J., dissenting) (referring to state-run prison as a "public entit[y]").

¹⁵42 U.S.C. §12101(a)(8), (9).

society. *Id.* §1125(b). Prisons frequently offer programs designed to rehabilitate prisoners and prepare them for life "beyond the walls."¹⁶ Indeed, the modern penitentiary, which had its origins in Pennsylvania, is founded on the notion of rehabilitative and vocational training. See HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* 179-80 (1927).

Accordingly, Petitioners' attempt to manufacture a "state prisoner" exception founders on the plain language of the ADA. Congress did make some exemptions from ADA coverage generally, but there is no state prisoner exception. See, e.g., 42 U.S.C. §12210(a) (current users of illegal drugs not "disabled"); *id.* §12208 (transvestites not "disabled"). When a statute lists specific exemptions, others are not to be judicially implied. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).¹⁷

There are no exceptions to Title II of the ADA, and no ambiguity about the scope of coverage. Thus, this case does not come within the rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991),¹⁸ where an exception to the scope of

¹⁶For example, "[i]t is the policy of the Bureau of Prisons to provide work to all inmates (including inmates with a disability who, with or without reasonable accommodations, can perform the essential tasks of the work assignment) contained in a federal institution This work is designed to allow inmates the opportunity to acquire the knowledge, skills, and work habits which will be useful when released from the institution." 28 C.F.R. §345.10. In contrast, the disabled prisoners in *Amos* alleged that they had been denied "the opportunity to participate in work release and pre-release programs because of their disabilities." *Amos*, 126 F.3d at 591. The Fourth Circuit's decision in that case ensured that this discrimination would continue.

¹⁷In contrast to Title II of the ADA, which covers *all* "public entities" without exception, the definition of a covered "employer" under Title I of the Act specifically exempts the federal government and federally owned corporations, Indian tribes, and certain non-profit private clubs. 42 U.S.C. §12111(5)(B)(i), (ii).

¹⁸Under the clear statement rule, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal (continued...)

coverage created an ambiguity as to whether the statute was meant to apply to judges. *Id.* at 467. Indeed, in *Gregory*, the broad language of the ADEA would have encompassed state judges had there not been an ambiguous exception to the statute: The "ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included." *Id.* at 467. Because Title II of the ADA has no exceptions at all, let alone one that could be construed to encompass state prisoners, it must be interpreted to include them.

That the ADA does not explicitly mention prisoners or prisons is not relevant. *Gregory* did not announce an "enumeration" rule, and Congress is not required to list every entity, or every aspect of an entity, that it intends to cover in a statute of general application. Petitioners' contrary argument "reflects an incorrect understanding of the kinds of laws Congress passes: it usually does not legislate by specifying examples, but by identifying broad and general principles that must be applied to particular factual instances." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 475 (1989) (Kennedy, J., concurring).¹⁹ This Court stated in *Gregory* that the clear statement rule does not require Congress to list those state functions it intends to cover. *Gregory*, 501 U.S. at 467 (ADEA need not

¹⁸(...continued)

Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460 (internal quotation marks and citations omitted).

¹⁹Requiring enumeration in broadly worded statutes would have several negative consequences. First, Congress would have to expend scarce legislative resources determining a "laundry list" of traditional state functions. Second, there is a high risk that Congress could inadvertently fail to list a specific state function, particularly since different states typically engage in different functions (i.e., snow removal in New Hampshire and volcano warnings in Hawaii). Third, an enumerated statute is inherently inflexible, making it difficult to adapt to changing circumstances and changing state functions.

"mention judges explicitly"); see also *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). Indeed, given Petitioners' concession that the ADA applies to prison guards and visitors, it is difficult to imagine the statute that Petitioners would ask Congress to draft—not only would it have to list "state prison" as a public entity, but it would have to specify that "guards, visitors, and inmates are protected." This is not the law. The fact that the ADA encompasses state prisoners, "even though it contains no express provisions to this effect, does not demonstrate ambiguity in the statute: It demonstrates breadth." *United States v. Monsanto*, 491 U.S. 600, 609 (1989) (internal quotation marks omitted).

Although Petitioners attempt to constitutionalize their argument by referencing the *Gregory* "clear statement rule," it is evident that they, and the lower court opinions they cite, are actually asking this Court to rewrite the plain language of the ADA by adding a "state prisoner exception" that does not exist in the text. Cf. Pet. Brf. 18-19. A close reading of the cited opinions reveals that the courts there were doing the same thing that Petitioners are doing here: straining to find a perceived ambiguity in the statute so as to find it inapplicable to prisoners, because they believed that application to prisoners would be difficult, and thus could not (or should not) have been intended by Congress. In the leading case of *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), explicitly followed and adopted by *Amos*, 126 F.3d at 591, the Fourth Circuit acknowledged that the language of the ADA "appears all-encompassing." *Torcasio*, 57 F.3d at 1344. It then set out in search of ambiguity. Ignoring statutory and dictionary definitions, it relied on intuition, finding that prisons

generally do not provide "services," "programs," or "activities" as those terms are *ordinarily understood*. . . . A prisoner is not *normally thought of* as one who would have occasion to "meet[] the essential eligibility requirements" for receipt of or participation in the services, programs, or activities

of a public entity. The terms "eligible" and "participate" imply voluntariness on the part of an applicant (*Id.* at 1347 (emphasis added))

Other cases cited by Petitioners acknowledged the ADA's broad and all-encompassing language but relied exclusively on *Torcasio's* explication of ambiguity²⁰ or explicitly acknowledged a judicially created exemption.²¹ Many more courts have explicitly found that the plain language of the ADA encompasses state prisoners, or have assumed such coverage—presumably because the statute is *not* ambiguous.²² Although Chief Judge Posner mused in *dicta* that Congress might not have intended the ADA to apply to prisons, he acknowledged that there is no express exception in the ADA for prisoners, and instead speculated about the possibility of crafting a "[j]udge-made exception . . . to avoid absurdity." *Bryant v. Madigan*, 84 F.3d 246, 248-49 (7th Cir. 1996) (*dicta*). But when squarely confronted with the issue, Judge Posner held that the ADA

²⁰The district court here, for example, relied exclusively on *Torcasio* with no independent analysis. JA 98-99. See also *Crawford v. Indiana Dep't of Correction*, 937 F. Supp. 785, 787-88 (N.D. Ind. 1996), *rev'd*, 115 F.3d 481 (7th Cir. 1997) (acknowledging "broad language" defining "public entity" and "program or activity" but relying on *Torcasio* to find ADA inapplicable).

²¹In *King v. Edgar*, No. 96 C 4137, 1996 U.S. Dist. LEXIS 17999 (N.D. Ill. Dec. 9, 1996), the court did not find ambiguity at all, but instead stated "it is so unlikely that Congress envisioned mandating equal participation for disabled prisoners that an exception should be inferred." *Id.* at *13.

²²*Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997) (Posner, J.); *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 559 (7th Cir. 1996); *Duffy v. Riveland*, 28 F.3d 447, 452 (9th Cir. 1996); *Key v. Grayson*, No. Civ. A 96-40166, 1998 WL 125769, at *3-*4 (E.D. Mich. Mar. 19, 1998); *Randolph v. Rodgers*, 980 F. Supp. 1051, 1059-60 (E.D. Mo. 1997); *Herndon v. Johnson*, 970 F. Supp. 703, 708 (E.D. Ark. 1997); *Kaufman v. Carter*, 952 F. Supp. 520, 529 (W.D. Mich. 1996); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996); *Dean v. Knowles*, 912 F. Supp. 519 (S.D. Fla. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1036-38 (S.D.N.Y. 1995).

applies to state prison inmates. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997). Thus, Petitioners' contention that the statute is necessarily ambiguous, because "federal judges across this country sharply disagree" about the applicability of the ADA to prisons, is based on a false premise. Pet. Brf. 18-21.

Because Title II of the ADA unambiguously covers *all* operations of *all* public entities, with no exception, it necessarily prohibits discrimination against state prison inmates with disabilities.

B. The Clear Statement Rule Should Not Be Applied To Determine Whether The ADA Protects State Prisoners.

There is no reason for this Court to use the clear statement rule to decide whether Title II of the ADA applies to state prison inmates, because (1) the statute is clear and unambiguous on its face, see Part II(A), *supra*; and (2) determining the conditions of confinement for prison inmates is not the type of sovereign state function implicated by this Court's decision in *Gregory*.

First, the clear statement rule is a tool of statutory interpretation that only is used when a statute is ambiguous. See *Gregory*, 501 U.S. at 461, 470; *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-06 (1991); *Salinas v. United States*, --U.S.--, 139 L. Ed. 2d 352, 363 (1997). This Court recently emphasized the important policy reasons for *not* applying the *Gregory* clear statement rule to an unambiguous statute:

Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, §1, of the

Constitution. (*Salinas*, 139 L. Ed. 2d at 363 (citations and internal quotation marks omitted))

In other words, this Court will not use a canon of *interpretation* to *rewrite* a statute.

Second, while management of state prison inmates is a function traditionally performed by states, it is not a fundamental attribute of state sovereignty. The clear statement rule is designed to maintain the "delicate balance" between the federal and state governments by insuring that Congress actually intended "to alter the usual constitutional balance." *Gregory*, 501 U.S. at 459-61. It thus applies to "decision[s] of the most fundamental sort for a sovereign entity." *Id.* at 460.²³

Accordingly, the *Gregory* clear statement rule does not apply to *any* federal law that impinges on a function that has traditionally been performed by the states, but only to federal laws directly impinging on a state's sovereignty as expressly guaranteed by the Constitution.²⁴ This reading of *Gregory* is consistent with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985), in which this Court "reject[ed], as unsound in principle and

²³To the extent there was any ambiguity in *Gregory* with respect to whether it applied only to "federal regulation of the qualifications of state officials" or "more broadly to the regulation of any 'state governmental functions'" (cf. *Gregory*, 501 U.S. at 478 (White, J., concurring and dissenting)), this Court clarified the rule in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 131 L. Ed. 2d 801 (1995), by limiting the clear statement rule to "a provision going 'beyond an area traditionally regulated by the States' to implicate 'a decision of the most fundamental sort for a sovereign entity.'" 514 U.S. at 732 n.5, 131 L. Ed. 2d at 809 n.5.

²⁴With the exception of the Fourth Circuit, all Courts of Appeals to consider the issue have declined to apply *Gregory* to "traditional" state functions. See *United States v. Lot 5, Fox Grove*, 23 F.3d 359, 362 (11th Cir. 1994) (homestead protection); *Reich v. New York*, 3 F.3d 581, 589-90 (2d Cir. 1993) (law enforcement); *Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993) (law enforcement); *EEOC v. Massachusetts*, 987 F.2d 64, 67-70 (1st Cir. 1993) (state employees).

unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" In large measure this was because the line proved, in practice, impossible to draw. See *id.* at 538-39 (comparing judicial decisions finding a "traditional" state activity with those declining to so find). However, the Court in *Garcia* also noted certain "rare exceptions, like the guarantee, in Article IV, Section 3, of state territorial integrity" in which the Constitution *does* "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550. This Court in *Gregory* relied on another such "express element of state sovereignty" guaranteed by the Constitution—the guarantee of a Representative government. *Gregory*, 501 U.S. at 463 (citing U.S. CONST. art. IV, §4). The other clear statement rule is based on States' immunity from suit, which is guaranteed by the Eleventh Amendment.²⁵

Moreover, management of state prison inmates—that is, determining the *conditions* of their confinement—could not be the type of "core" state function this Court had in mind in *Gregory*. To the contrary, there always has been a place for federal oversight of state prisons. The Court's deference to prison administrators is a policy of restraint, not abdication. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84-85, 99-100 (1987) (striking down prohibition on inmate marriages).

²⁵Certainly, *Gregory* did not purport to overrule longstanding preemption doctrine. *Gregory* did not substitute a requirement that congressional intent be clear in the text of the statute for the normal rule, which requires only that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *Rice* was a standard statutory construction case in which this Court relied explicitly on legislative history to determine Congressional intent, rather than requiring a "clear statement" in the text of the statute itself. 331 U.S. at 232-36; see also *United States v. Bass*, 404 U.S. 336, 344-47 (1971) (examining legislative history).

Moreover, Petitioners concede that the ADA applies to certain aspects of prison management—including the employment of prison staff and treatment of visitors. JA 114. If the operation of state prisons were truly a core state function, then employment of guards (who are ultimately responsible for prison security and for enforcing the prison administration's policy choices) would also be a "traditional" state function to which the clear statement rule applied. Cf. *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (discussing importance of State's "abilities to structure employer-employee relationships"). Of course, this is not the law. Courts do not refuse to apply Title VII or the ADA to prison employment situations, despite security issues that may differentiate prisons from most other functions traditionally performed by states; instead, security is taken into account in deciding the reasonableness of a requested accommodation. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 331-36 (1977) (gender is a bona fide occupational qualification that may, consistent with Title VII, disqualify women for employment as corrections officers in certain circumstances); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 485 (7th Cir. 1997) (person with severe vision impairment not "otherwise qualified" to serve as prison guard).²⁶

Finally, Title II of the ADA clearly was intended to alter the federal-state balance of powers: it expressly applies to states, and abrogates their Eleventh Amendment immunity. Congress explicitly intended to eliminate discrimination in institutions traditionally operated by states such as schools,

²⁶The fact that states often contract out prison operations also indicates that management of prisoners is not the type of "core" state function implicated in *Gregory*. See, e.g., *Richardson v. McKnight*, —U.S.—, 138 L. Ed. 2d 540, 547-49 (1997) (discussing history of private prisons, including a limited prison contracting system in Pennsylvania); T. Don Hutto, *The Privatization of Prisons*, in *ARE PRISONS ANY BETTER?* 111, 124-25 (J. Murphy & J. Dison eds., 1990) (noting increase in number of profitable private prison companies, and states contracting for such services).

courts and hospitals. Petitioners have failed to distinguish management of state prisoners from these other "traditional" state functions that are concededly covered by the ADA. They cannot explain how applying the ADA to state prisoners encroaches on the states' sovereignty any more than applying the ADA to other state functions.

C. Under Normal Rules Of Statutory Construction, The ADA Should Be Applied To State Prisoners.

1. The ADA Incorporates Section 504 Regulations That Have Consistently Applied To Prisons.

Title II of the ADA incorporates the Department of Justice ("DOJ") Section 504 regulations, which have applied to prisons for almost two decades. In enacting Title II Congress *expanded* the scope of coverage of Section 504 so that *all* programs, services, or activities of state and local governments, and not just those that receive federal funds, would operate free of disability-based discrimination. See H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 366. Title II explicitly adopted two sets of DOJ Section 504 regulations: the DOJ "coordination" regulations, codified at 28 C.F.R. pt. 41, and the DOJ "federally conducted" regulations codified at 28 C.F.R. pt. 39. 42 U.S.C. §12134(b).²⁷ The coordination regulations direct federal agencies to promulgate their own Section 504 regulations and to "include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency." 28 C.F.R. §41.4(c). The DOJ's own recipient regulations (codified at 28 C.F.R. part 42) were consistent with that approach, specifically referring to programs that received

²⁷Section 12134(b) refers to "the coordination regulations under Part 41 of title 28, Code of Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978)." These HEW regulations were adopted by the DOJ when it took over coordination responsibilities. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 n.14 (1984).

federal financial assistance from DOJ, including prisons. See 28 C.F.R. §42.540(h) (1980) (defining "program" to include "operations of . . . department of corrections"); 28 C.F.R. §42.540(j) (1980) ("Benefit" includes provision of services . . . (i.e. . . . confinement . . .)); 45 Fed. Reg. 37,621 (1980) (qualified interpreters important in correctional rehabilitation settings); 45 Fed. Reg. 37,627 (1980) ("prisoners" as covered beneficiaries); 45 Fed. Reg. 37,630 (1980) (specific discussion of application of Section 504 to prisons). Additionally, as of 1988, recipients of federal funds were required to comply with the Uniform Federal Accessibility Standards ("UFAS"), 41 C.F.R. subpt. 101-19.6, App. A. See 28 C.F.R. §42.522(b). UFAS requires that 5% of "residential units" in "Jails, Prisons, Reformatories, Other detention or correctional facilities" be constructed in accordance with the accessibility standards. 41 C.F.R. subpt. 101-19.6, App. A §4.1.4(9)(c). For the purposes of "program accessibility, existing facilities" and "communication" Congress codified the DOJ "federally-conducted" regulations, 28 C.F.R. pt. 39. 42 U.S.C. §12134(b). These regulations have also consistently been applied to prisons,²⁸ and incorporate the UFAS standards which explicitly apply to prisons. See 28 C.F.R. §39.150 (requiring alterations to meet accessibility requirements of regulations implementing Architectural Barriers Act of 1968, UFAS).

Congress explicitly directed that "nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. §12201(a).²⁹ We must assume that Congress reviewed the

²⁸See 28 C.F.R. pt. 39, Editorial Note at 686 (describing "Federal prison system" as "programs that provide Federal services or benefits"); 28 C.F.R. §39.170(d) (grievance procedure for federal prisoners under Rehabilitation Act). These regulations were submitted to Congress for approval. See 28 C.F.R. pt. 39, Editorial Note at 685.

²⁹According to the committee report, "nothing in the ADA is intended (continued...)

"federally assisted" regulations before deciding to approve them in the ADA (see *Traynor v. Turnage*, 485 U.S. 535, 546 (1988)); we know that the "federally conducted" regulations were reviewed. See 28 C.F.R. pt. 39, Editorial Note at 685. When Congress voices its approval of an administrative interpretation of a statute, "Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Board of Comm'rs*, 435 U.S. 110, 134-35 (1978); see also *Consolidated Rail Corp.*, 465 U.S. 624, 634-35 & nn.14, 16 (1984) (enforcement regulations under Section 504 "particularly merit deference" because Congress incorporated the substance of the regulations into the statute).

2. The Legislative History Supports Application Of The ADA To Prisons.

Congress intended that the ADA and Section 504 apply to prisoners. Congress was involved in the formulation of the Section 504 regulations which are incorporated in Title II, and endorsed them in their final form, as this Court recognized in *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 634. During hearings on the progress of these regulations, the official in charge of developing them was specifically asked whether they would apply to convicts. He explained that "[o]bviously, someone who is a convict or an ex-convict who otherwise fits the definition of a handicapped person would be covered within the definition of handicapped persons." *Rehabilitation of the Handicapped Programs, 1976: Hearings Before the Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare*, 94th Cong. 1513 (1976).

In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, to overturn the Court's decision

²⁹(...continued)

or should be construed to limit the scope of coverage or to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, or the regulations implementing that title." H.R. REP. NO. 101-485(III), at 69 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 492.

in *Grove City College v. Bell*, 465 U.S. 555 (1984), which had narrowly interpreted the prohibition on sex discrimination in federally funded programs under Title IX, 20 U.S.C. §1681, to apply only to the actual program that received the federal funds. See S. REP. NO. 100-64, at 3-5 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 4-7; *Consolidated Rail Corp.*, 465 U.S. at 635. Because "Congress intended that Title VI as well as its progeny—Title IX, Section 504, and the [Age Discrimination Act]—be given the broadest interpretation" (1988 U.S.C.C.A.N. 3, at 9), it explicitly broadened the definition of "program or activity" to prevent application of *Grove City* to a whole range of institutions that received federal funds, including prisons:

Clear violations of federal law go uncorrected while students lose valuable educational benefits that can rarely be recovered and employees lose jobs or job opportunities. Prolonged debate takes place over what constitutes a "program or activity" under the civil rights law, while the universities, schools, and correctional facilities receive millions of federal dollars. (*Id.* at 9 (emphasis added))

Prior to enacting the ADA, Congress heard and read testimony about the need to end discrimination against people with disabilities in all aspects of law enforcement, including the treatment of arrestees and inmates. For example, as Petitioners acknowledge (Pet. Brf. 16), Congress relied heavily on the United States Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities* (1983), which was entered as testimony before several House and Senate subcommittees. See S. REP. NO. 101-116, at 6 (1989); H.R. REP. NO. 101-485(II), at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 310. This report specifically identified the criminal justice system, including prisons, as a setting in which disability discrimination occurs. For example, the report lists "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities," "[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible

jail cells and toilet facilities)" and "[a]buse of handicapped persons by other inmates." *Accommodating the Spectrum* at Appendix A. Congressional subcommittees heard or read testimony about hearing-impaired people who were arrested and held in jail overnight without knowing their rights or even what they were being held for, and an HIV-positive man arrested in Kentucky and locked outside in a car overnight rather than being admitted into the jail.³⁰ The House Committee Report noted that

persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. (H.R. REP. NO. 485(III), at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473)

Moreover, when Congress enacted the ADA, Section 504 had been applied to state prisons in several reported cases. See *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988); *Journey v. Vitek*, 685 F.2d 239, 241-42 (8th Cir. 1982); *Kendrick v. Bland*, 541 F. Supp. 21, 39-40 (W.D. Ky. 1981); *Sites v. McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976). Congress is presumed to be aware of existing legal precedent and to take it into consideration when it enacts legislation. *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979). Here such a presumption is especially fitting, as Congress enacted the ADA specifically to broaden—not to narrow—Section 504's coverage.

³⁰Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Relations, 101st Cong. 254 (1989); Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Relations, 100th Cong. 77 (1988).

3. Department Of Justice Regulations Applying The ADA To Prisoners Are Entitled To Great Deference.

Congress explicitly delegated authority to the Department of Justice to construe the ADA by regulation. 42 U.S.C. §12134(a). Therefore, courts interpreting the ADA must give these regulations legislative and hence "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

A statute's construction by the agency charged with administering it "may not be disturbed . . . if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). Because there is nothing in the language of the statute or in the legislative history that indicates that Congress intended to exclude prisoners from Title II, the construction of the Department of Justice, which is consistent with the existing agency construction of Section 504 when Congress incorporated it into Title II, is entitled to substantial deference.

The ADA's implementing regulations state that the Act is to be applied to state prisons. The DOJ is specifically responsible for implementing ADA compliance procedures for "correctional institutions." 28 C.F.R. §35.190(b)(6). Additionally, the DOJ's interpretative analysis discusses state prisoners:

A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, *except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.* (28 C.F.R. pt. 35, App. A, at 478 (emphasis added))

Moreover, the building standards approved by the DOJ under the ADA (a choice of either UFAS or ADAAG), contain specific guidelines for accessibility in jails and prisons. 28 C.F.R. §§35.150(b)(1), 35.151(c); 41 C.F.R. subpt. 101-19.6, App. A §4.1.4(9)(c); 63 Fed. Reg. 2000, 2046-2048 (Jan. 13, 1998) (to be codified at 36 C.F.R. pt. 1191, §12).

4. A Judicially Created Exemption To The ADA For State Prisoners Is Not Warranted.

Petitioners, not having any support for their position in the language of the statute, its legislative history, or its implementing regulations, resort to speculation about what might happen if the ADA were to be applied to prisoners, and urge this Court to exempt state prison inmates from the ADA's protection based on an imaginary parade of horrors. Petitioners' purported policy justifications, however, fail to demonstrate that application of the ADA to state prisoners is absurd, unexpected, or even unwise.

Although this Court has the power to "amend" the plain language of a statute, that power is to be exercised under very limited circumstances: "[w]here the plain language of the statute would lead to 'patently absurd consequences' . . . that Congress could not possibly have intended." *Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring); see also *United States v. Locke*, 471 U.S. 84, 95 (1985). If the exception were not thus limited, it would "allow judges to substitute their personal predilections for the will of the Congress." *Public Citizen*, 491 U.S. at 474 (Kennedy, J., concurring). Because application of the ADA does not lead to "patently absurd" results, its plain language cannot be ignored.³¹

³¹Moreover, if this Court believes that applying the plain language would lead to absurd results, it must look to legislative history to determine congressional intent. *Public Citizen*, 491 U.S. at 454; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring)

(continued...)

In many relevant respects prisons are similar to numerous other government institutions such as mental hospitals, universities and homeless shelters where state officials have the responsibility under the ADA for providing basic, life-sustaining services. Petitioners' concession that the ADA applies to prison employees and visitors undercuts their argument that the management of prisons qua prisons is always different than management of other state activities. Moreover, there are many modifications that will not conflict with any of the security interests that may set prisons apart from other public institutions or agencies. For example, constructing a ramp to the infirmary or classroom for prisoners who use wheelchairs and providing emergency warning systems for deaf prisoners will foster rather than hinder legitimate penological objectives.³²

Nor is there merit to Petitioners' argument that the purpose of the ADA is to reduce the "dependency and nonproductivity" of people with disabilities, and that, because prisoners are already dependent on their custodians, applying the ADA to prisoners will increase, rather than decrease, the costs of dependency. Pet. Brf. 14. Petitioners focus only on the purported costs of accommodating prisoners with disabilities while in prison, and ignore the fact that most prisoners are eventually released from prison. See *Turner*, 482 U.S. at 96. If prisoners with disabilities are forced to sit idle in their cells, rather than taking part in educational or vocational training,

³¹(...continued)

(it is appropriate to consult legislative history to ensure that there is not a shred of evidence to support the purported "absurd" result).

³²There undoubtedly will be cases where a security issue is presented. See, e.g., Brief of Amici Curiae Nevada, et al. at 3 (suggesting that violent inmate using a prosthetic device as a weapon implicates security concerns). In such a case, prison officials would not be required to allow the inmate to continue using the device around others if this would create a significant security risk. See *School Board v. Arline*, 480 U.S. 273, 286 n.15 (1987).

they are more likely to lead lives of "dependency and nonproductivity" upon release; if they are given equal opportunities in prison, they have a chance to compete equally upon release.³³

Chief among Petitioners' concerns is the threat of ADA litigation by prisoners. See Pet. Brf. 10, 14-15. However, a statute is not absurd because it grants individuals legal rights. Petitioners fundamentally misapprehend both the ADA and the function of the judiciary when they contend that "federal courts will be used to reconstruct prison cells, to alter scheduling of inmate movements and assignments, and to interfere with security procedures." Pet. Brf. 10.³⁴ The ADA does not authorize or require what Petitioners claim to fear. To the contrary, it requires only reasonable modifications to avoid discriminating against individuals with disabilities. Moreover, it is Petitioners' obligation to obey federal law, and generally states can be expected to follow the law without interference by courts. It is only when Petitioners disobey the law that a federal court might order Petitioners to do that which they should have done

³³Indeed, studies in Pennsylvania and elsewhere demonstrate that inmate participation in vocational training and prison industry programs reduces recidivism and increases post-release employment. See, e.g., PENN. DEPT OF EDUC. FINAL REPORT: A PROGRAM TO REINTEGRATE PENNSYLVANIA INMATES THROUGH LIVE WORK AND COMMUNITY INVOLVEMENT 34, 56-62 (June 30, 1996); WILLIAM G. SAYLOR & GERALD G. GAES, U.S. FED. BUREAU OF PRISONS INTERIM REPORT: THE EFFECT OF PRISON WORK EXPERIENCE, VOCATIONAL AND APPRENTICESHIP TRAINING ON THE LONG-TERM RECIDIVISM OF U.S. FEDERAL PRISONS 4-5 (Nov. 1995).

³⁴Petitioners' reliance on the *Purcell* case is misplaced. Contrary to their assertion, the district court did not hold that prison officials "had an obligation to 'accommodate' Purcell's Tourette's by permitting him to return to his cell when he needed to release his verbal and motor tics." Pet. Brf. 16 n.5 (quoting *Purcell v. Pennsylvania Dep't of Corrections*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *26 (E.D. Pa. Jan. 9, 1998)). Instead, the court denied defendants' motion for summary judgment because punishing Purcell for remaining in his cell to release his tics, despite the fact that prison doctors had provided Purcell with medical authorization to return to his cell to alleviate his tics, "might violate Title II." *Id.* at *27 (emphasis added).

without judicial prompting: obey the law.³⁵ Even then, following well-established principles of judicial deference to state prison authorities, courts are to give prison officials an opportunity to themselves devise a remedial plan that complies with the ADA. See *Lewis v. Casey*, 518 U.S. 343, 135 L. Ed. 2d 606, 625 (1996).

Nor is there any merit to Petitioners' claim that the sheer number of prisoners with disabilities mitigates *against* applying the ADA to prisons; it simply demonstrates why Congress enacted the ADA as an extremely broad and comprehensive statute, designed to cover all possible places in which people with disabilities might find themselves.

III.

THE COURT SHOULD NOT REACH THE CONSTITUTIONAL ISSUES.

Petitioners have not directly challenged the constitutionality of the ADA, but have only raised the constitutional issues to persuade the Court to apply the clear statement rule. Thus, there is no reason for the Court to directly address these issues.

There also are sound prudential reasons for not deciding the constitutional issues. Because Petitioners did not raise any constitutional questions in the courts below (see JA 103), and those courts did not have an opportunity to rule on these issues, this Court does not have the benefit of lower court opinions squarely addressing the constitu-

³⁵See *Lewis v. Casey*, 518 U.S. 343, 135 L. Ed. 2d 606, 617 (1996) ("It is for the courts to remedy past or imminent official interference with individual inmates' [legal rights]; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the [legal rights] will not occur. Of course the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm").

tional issues, nor of fully crafted arguments tested in the crucible of the lower courts. See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). Nor is there any split of authority in the Circuit Courts requiring dedication of the Court's scarce resources.³⁶ See *Yee*, 503 U.S. at 537-38.

IV.

PETITIONERS' CONSTITUTIONAL ARGUMENTS HAVE NO MERIT.

A. Petitioners' "As Applied" Challenge To The Statute Is Too Broad.

In addition to sound prudential reasons for not deciding the constitutional issues, there is a fundamental problem with Petitioners' analysis. Petitioners have virtually ignored the facts of *Yeskey's* case in favor of a constitutional attack against the ADA as applied to all prisoners with disabilities in all state prisons under all circumstances. This wide-ranging, unfocused challenge should not be accepted by the Court because there is no record of an actual or imminent application that would present the constitutional question in a "clean-cut and concrete form." Cf. *Renne v. Geary*, 501 U.S. 312, 322 (1991). Any particular application that could cause a constitutional infirmity might require a limiting construction rather than invalidating the protections of the ADA for an entire class.

³⁶To our knowledge no Circuit Court has determined whether the ADA—as applied to prisoners or otherwise—is within Congress's Commerce Clause powers. Three Circuit Courts have held that Congress acted constitutionally in abrogating the States' 11th Amendment immunity from suit, and in doing so held that Congress properly exercised its 14th Amendment powers to enact the ADA. See *Coolbaugh v. Louisiana*, —F.3d—, No. 96-30664, 1998 WL 84123, at *3-*8 (5th Cir. Feb. 27, 1998); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Crawford*, 115 F.3d at 487 (decided before this Court's decision in *City of Boerne v. Flores*).

Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); *Burson v. Freeman*, 504 U.S. 191, 210 n.13 (1992) (plurality opinion).

Even if Petitioners' broad challenge is accepted, to succeed on this appeal from a motion to dismiss they must prove that there is no set of facts upon which Yeskey or any other disabled prisoner could constitutionally prevail. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Petitioners cannot meet their burden. For example, at trial the evidence may show that there is no sound reason for excluding Yeskey from Boot Camp. In another case, there may be no legitimate penological justification for prohibiting an inmate who uses a wheelchair from eating in the dining hall. The fact that there might conceivably be other circumstances which raise constitutional questions about the application of the ADA is insufficient reason to hold the statute unconstitutional. See *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Should a conflict with penological interests arise in a specific case, the ADA is sufficiently flexible to provide ample opportunity to adjust the relief to the prison setting, or to deny any relief at all. See Parts I and II(C)(4), *supra*. The Court need not resolve the constitutional issues since it must presume that the lower courts will construe the statute so that it is consistent with the Constitution.

B. Congress Properly Exercised Its Powers Under Section 5 Of The 14th Amendment.

If the Court elects to reach the constitutional issues, the judgment should still be affirmed because the ADA was properly enacted by Congress.

Petitioners concede that Congress properly enacted the ADA to enforce the Equal Protection Clause of the Fourteenth Amendment pursuant to its express power under Section 5 of that Amendment. Pet. Brf. 26. Petitioners claim, however, that there is a serious question about whether Congress could constitutionally apply the ADA to the "management of state prisons." *Id.* But

Congress constitutionally enacted the ADA as a comprehensive remedy to eliminate the undisputed evil of pervasive invidious discrimination against individuals with disabilities, regardless of where the discrimination takes place. The types of discrimination faced by prisoners with disabilities are often the same as those in other environments, and the fact that prisoners are completely dependent upon prison officials for satisfaction of their basic needs makes the discrimination more pernicious. There is no constitutionally acceptable reason for the ADA's protection against discrimination to stop at the prison gates.

1. Congress Has Broad Powers To Enact Remedial And Preventative Legislation To Enforce The Equal Protection Clause In State Prisons.

Over a century ago the Court recognized Congress's broad powers:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. (*Ex parte Virginia*, 100 U.S. 339, 345 (1880) (quoted with approval in *City of Boerne v. Flores* --U.S.--, 138 L. Ed. 2d 624, 637 (1997))

Congressional power under Section 5 of the Fourteenth Amendment extends beyond principles of federalism and overrides the sovereign powers of the States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

Last Term the Court reaffirmed that Congress has the power and the duty under Section 5 to use "strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights" *City of*

Boerne v. Flores, —U.S.—, 138 L. Ed. 2d 624, 642 (1997). Congress must determine in the first instance what legislation is necessary to protect Fourteenth Amendment freedoms and “its conclusions are entitled to much deference.” *Id.* at 649. Congress must have the “necessary latitude to try new techniques” to achieve the goal of equality. *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1980) (plurality opinion).

2. As Applied To State Prisoners The ADA Is A Constitutional Exercise Of Congress's Remedial Powers.

Petitioners concede that Congress had ample evidence of unconstitutional discrimination against individuals with disabilities, and that the means Congress chose to remedy that discrimination in free society is “proportionate to the ends legitimate under §5.” Pet. Brf. 13, 26. They also concede that prison employees and visitors are entitled to protection and reasonable modifications under the ADA. JA 114 n.8. Thus, Petitioners' broad contention that the ADA is entirely inconsistent with the management of state prisons is wrong by their own admission. Moreover, the premise of Petitioners' position—that the ADA is not congruent and proportional when applied to prisoners—is not correct.

Petitioners' argument comes down to the claim that the Court should create a special exception and hold that the ADA does not apply to prisoners under any circumstances, even to provide the same reasonable modifications that are concededly required to accommodate prison guards and visitors. This claim is contrary to the language of the ADA, to logic and to common sense. Nor is the claim supported by the sole authority Petitioners cite, *City of Boerne*.

In *City of Boerne* the Court held that the Religious Freedom Restoration Act (RFRA), was unconstitutional because it intended a substantive change in the meaning of the Free Exercise Clause by expressly overruling one of the Court's decisions interpreting that clause. 138 L. Ed. 2d at

634, 644-49. Recognizing that the difference between remedial legislation and substantive change is one of degree, the Court looked to the essential ingredients of remedial legislation—“congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”—to weed out statutes that unmistakably fall on the wrong side of the line. *Id.* at 638. “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” *Id.* at 645.

The Court had little trouble recognizing that Congress had made a drastic change in the law when it enacted RFRA. Before RFRA all neutral state laws that had an incidental burden on religion were constitutional under *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 888-89 (1990); after RFRA most of those same state laws would fall. 42 U.S.C. §2000bb-1 (any incidental impact would require government to prove that law was least restrictive alternative that furthered compelling state interest). And there was little doubt about Congress's intent—it enacted RFRA to overrule *Smith*. See 42 U.S.C. §2000bb(a), (b). Thus, RFRA did not embody the same “substantive constitutional value” that the Supreme Court had given to the Free Exercise Clause. D.O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance Of An Unconstitutional Statute*, 56 MONT. L. REV. 39, 64 (1995).

In contrast to RFRA, the ADA is consistent with and supplements the substantive values embodied in the Equal Protection Clause, as interpreted by *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case the Court unanimously applied the Equal Protection Clause to strike down discriminatory conduct directed against individuals with a disability (mental retardation). The Court recognized that people with mental retardation are subject to negative attitudes, fear and irrational prejudice, and that invidious discrimination against them was likely to continue. *Id.* at 446, 448, 450.

This observation, as applied to all individuals with disabilities, including prisoners, expresses well the findings and purposes that underlie the ADA. See 42 U.S.C. §12101(a)(7), (8) and (b)(1). The heart of the statute expresses in plain terms the meaning of the Clause as it has been applied to people with disabilities: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. §12132.

This general anti-discrimination provision and its constitutional foundation are equally applicable to prisoners. Since Petitioners agree that prisoners retain their right to be free of discrimination under the Constitution, Pet. Brf. 28, Congress can enforce Section 5 so that they are. *Turner v. Safley*, 482 U.S. at 84 (prisoners retain the right to be free of unconstitutional discrimination); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (per curiam) (same).

a. Applying The ADA To Prisoners Is Consistent With The Court's Interpretation Of The Equal Protection Clause.

Petitioners argue that the ADA as applied to state prisoners is unconstitutional because Congress has changed the meaning of the Equal Protection Clause by positioning the level of scrutiny of prison officials' actions above the constitutional floor. Pet. Brf. 30. Petitioners argue that the ADA changes the meaning of the Constitution because the Department of Justice regulations implementing the ADA require something more than the rational basis test announced in *City of Cleburne* and the prison specific test announced in *Turner v. Safley*, 482 U.S. at 89. In this way, Petitioners argue, the ADA as applied to prisons is like RFRA in that it changes the meaning of the Constitution. Pet. Brf. 28.

Petitioners' argument misses a critical distinction between changing the substantive meaning of the Constitution and adopting a remedy that is different than the type and level of scrutiny employed by the judiciary in individual cases in the absence of "controlling congressional direction." *Cleburne*, 473 U.S. at 439. As long as Congress acts in a manner consistent with the Court's interpretation of the Equal Protection Clause to deter or remedy unconstitutional violations, which it did, it has the power under Section 5 to employ in the ADA remedies that will prohibit "conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'" *City of Boerne v. Flores*, 138 L. Ed. 2d at 637 (emphasis added); *Fullilove v. Klutznick*, 448 U.S. at 483-84, 490 (plurality opinion) (Congress is not limited to judicial remedies and has latitude to try new techniques).³⁷ Thus, Congress has the authority, in appropriate circumstances, to make unlawful the specific actions that the Court has declined to find unconstitutional, and those that the judiciary has specifically found to be constitutional. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966); *City of Rome v. United States*, 446 U.S. 156 (1980).³⁸

These principles and the cases that confirmed them all met with approval in *City of Boerne*, 138 L. Ed. 2d at 637-38. Nothing in the ADA requires more of state officials than the

³⁷"[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" to enforce the Equal Protection Clause. *Fullilove v. Klutznick*, 448 U.S. at 483 (plurality opinion). The Court owes Congress the greatest deference in the selection of "instrumentalities to perform a function that is within its power." *Id.* at 480.

³⁸*South Carolina v. Katzenbach* and *City of Rome* concerned the scope of Congress's authority under Section 2 of the Fifteenth Amendment. Because congressional authority under this Section is the same as that under Section 5 of the Fourteenth Amendment, the Court has relied on cases under both sections interchangeably. *South Carolina v. Katzenbach*, 383 U.S. at 326.

statutes did in these cases. Thus, any perceived enhancement of judicial scrutiny of actions by prison officials does not by itself cause the ADA or any other statute to fall outside the scope of Congress's power under Section 5 of the Fourteenth Amendment. "It has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the [Fourteenth] Amendment's commands."³⁹ *City of Rome*, 446 U.S. at 210 (1980) (Rehnquist, J., dissenting); *Clark v. California*, 123 F.3d at 1271 (Congress's powers are not confined by the level of judicial scrutiny).

It would be inconsistent with Congress's institutional capabilities to limit its remedial powers to those employed by the judiciary. The *Cleburne* and *Turner* tests were both adopted in large part because the Court believed that the legislature and the executive branches, rather than the judiciary, should have the primary responsibility for deciding how persons with disabilities and prisoners should be treated. *Turner*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government"); *City of Cleburne*, 473 U.S. at 440 (absent congressional direction, courts devise standards of review); *id.* at 442-43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter very much a task for legislators guided by qualified professionals and not by perhaps ill-informed opinions of the judiciary").

The legislative and the executive branches (after exhaustive study and long experience) have now spoken through the ADA and the Department of Justice implementing regulations, and have chosen those remedies that in prison and elsewhere most appropriately balance the

³⁹Any other rule would confine Congress's power to the "insignificant role" of abrogating laws that the judiciary was prepared to find unconstitutional. *Katzenbach v. Morgan*, 384 U.S. at 649.

competing interests. Indeed, in *Cleburne* the Court applauded the national legislative response and cited with approval the ADA's predecessor, Section 504 (which was applied by regulations to state prisons). See *Cleburne*, 473 U.S. at 443-45 ("a civilized and decent society expects and approves such legislation"). That legislative response does not become unconstitutional, as Petitioners contend, because the other branches of government employed a different means of enforcing constitutional rights of disabled persons than that adopted by the Court—particularly because the judicially created test was specifically designed to permit the Legislature "flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." *Id.* at 445; see also *Coolbaugh v. Louisiana*, 1998 WL 84123, at *6 (deference to Congress particularly appropriate because *Cleburne* held it was appropriate branch to make findings and decisions on treatment of disabled).

b. The Legislative Record Is Sufficient To Support The ADA's Application To State Prisoners.

Again relying on *City of Boerne*, Petitioners maintain that no legislative response is appropriate to enforce the Fourteenth Amendment because there is no information in the legislative record indicating that discrimination against state prisoners with disabilities is a widespread problem. Pet. Brf. 26. Congress is not required to legislate so narrowly. Prisoners with disabilities, like others in the community and in different types of institutions, are entitled to protection from discrimination.⁴⁰ "In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Oregon v.*

⁴⁰As set forth *supra*, Part II(C)(2), and in Brief for Amici Curiae the National Advisory Group for Justice, et al., Congress had evidence of discrimination in the criminal justice system in general and against prisoners in particular.

Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J., concurring and dissenting).

Respect for a co-equal branch of government demands substantial judicial deference to the factual findings and predictive judgments of Congress. *Turner Broadcasting Sys. v. FCC*, 520 U.S.—, 137 L. Ed. 2d 369, 391-92 (1997). “[C]omplete factual support in the record for the . . . judgment or prediction is not possible or required” *Id.* (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978)). Congress would suffer an impossible burden if, as Petitioners implicitly suggest, it were required to gather evidence about each type of state agency before it could act comprehensively. *Turner Broadcasting Sys.*, 137 L. Ed. 2d at 402.

Thus, when deciding to enact a national ban on literacy tests it was sufficient for Congress to find that racial prejudice is prevalent throughout the country and that such tests were discriminatory. Congress was not required to determine whether such tests had a discriminatory purpose or effect in every state and in each jurisdiction. *Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring and dissenting); see also *id.* at 216 (Harlan, J., concurring and dissenting) (Congress can decide whether to make a “more particularized inquiry”); *Katzenbach v. Morgan*, 384 U.S. at 653. If Congress has the authority to enact a nationwide remedy against discrimination without evidence of constitutional violations in every state then *a fortiori* it must have the same authority to enact national laws without gathering evidence about each state agency. Cf. *City of Rome*, 446 U.S. at 193 (Stevens, J., concurring) (“Congress has the constitutional power to regulate voting practices in Rome, so long as it has the power to regulate such practices in the entire State of Georgia”).

An extensive record of pervasive discrimination was not available to Congress when it enacted RFRA. The Court held that RFRA could not be justified as a remedy for unconstitutional conduct because the remedy was so far out of proportion to the perceived harm. *City of Boerne*, 138 L.

Ed. 2d at 646. The Court reached this conclusion after noting that the legislative record revealed no incidents of laws passed because of religious bigotry in the last forty years. *Id.* at 645 (“deliberate persecution is not the usual problem in this country”).

Unlike RFRA and like the voting rights statutes, when enacting the ADA Congress found, as Petitioners properly concede, that in our society discrimination against the disabled is “pervasive.” Pet. Brf. 13; 42 U.S.C. §12101(a)(2). Something is pervasive when it has “become diffused throughout every part.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1688 (1966). Prisons are a significant, and growing, part of our society. See Pet. Brf. 9 n.1. There is no reason, and Petitioners have not advanced one, to believe that prisoners are immune from discrimination that has infected every other part of society. See Briefs of Amici Curiae ACLU, et al. and ADAPT, et al. (collecting cases of discrimination against prisoners with disabilities). “Prejudice, once let loose, is not easily cabined.” *City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring and dissenting).

The ADA, therefore, is a constitutionally acceptable remedy for a well-documented and prevalent form of discrimination.

c. The ADA Does Not Impose A Constitutionally Excessive Burden On Prison Officials.

As noted in Part I, *supra*, the ADA is a comprehensive remedial statute of general application. It applies, by its terms, to all types of state and local government entities, such as schools, hospitals, universities, departments of motor vehicles and prisons. It is true that prisons can be dangerous places with security concerns that require particular expertise to manage. But, prisoners, unlike most other individuals with a disability, are completely dependent upon prison officials for access to all services,

including those that meet their basic needs. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (medical care).

The regulations implementing the ADA make the statute's general non-discrimination mandate specific in a way that is sensitive to the peculiar needs of individuals with disabilities and the policy decisions of local and state governments. *See supra*, Parts I and II(C)(4). Unlike RFRA, which would have permitted certain individuals to ignore local laws, the ADA regulations are a balanced response to competing interests that flow in large part from the Court's prior decisions interpreting Section 504. These regulations do not, like RFRA, provide all citizens, including prisoners, with a right that necessarily conflicts with state and local laws of general application and allow an individual to "ignore" even criminal laws. *See Employment Division v. Smith*, 494 U.S. at 889.

As a matter of law these remedies do not become disproportionate in state prison.⁴¹ Prison officials retain considerable discretion to safely care for, treat, discipline and rehabilitate prisoners. As Justice Posner explained in a decision upholding the ADA against a similar constitutional challenge:

Terms like "reasonable" and "undue" are relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory, as the Supreme Court has emphasized in the parallel setting of prisoners' constitutional rights. *E.g., Turner v. Safley, supra*, 482 U.S. at 84-

⁴¹The Voting Rights Acts approved by the Court were much more intrusive; no state interest was sufficient to overcome the statute, and the restrictions were directly aimed at the heart of the States' sovereign powers. States were not permitted to change their voting policies and practices without permission from the Attorney General or a federal court. *City of Rome*, 446 U.S. at 163-64. Certain methods of determining voting qualifications in all of the states were completely banned. *Oregon v. Mitchell*, 400 U.S. at 118 (Black, J.); *Katzenbach v. Morgan*, 384 U.S. at 644-47. Federal examiners even had the authority to decide who was eligible to vote. *South Carolina v. Katzenbach*, 383 U.S. at 316.

91. The security concerns that the defendant rightly emphasizes in urging us to exclude prisoners from the protections of the Act are highly relevant to determining the feasibility of the accommodations that disabled prisoners need in order to have access to desired programs and services. (*Crawford v. Indiana Dep't of Corrections*, 115 F.3d at 487)

Petitioners have no basis for claiming that the ADA will result in a disproportionate response at this stage of the proceedings, since the case is on appeal from a motion to dismiss. It is significant that Petitioners did not hint at the slightest security basis for denying Yeskey the right to participate in the Boot Camp. Pet. Brf. 31; *see also Yeskey*, 118 F.3d at 169, 174; JA 133-34 (doubting that security concerns will be germane on remand). In fact, Yeskey's participation in the program would have been congruent with an important penological objective—rehabilitation. *See* PA. STAT. ANN. tit. 61, §1125(b)(1) (West Supp. 1997) ("The objectives of the program are: (1) To . . . reduce recidivism and promote characteristics of good citizenship among eligible inmates").

Petitioners argue that Yeskey has no right under Pennsylvania law and the Constitution to compel his participation in the Boot Camp, and that the ADA would grant him that right unless the state can prove it would cause a fundamental alteration of the program. Pet. Brf. 31. They are wrong. Title II of the ADA is a remedy for unlawful government discrimination—nothing more. If Yeskey is "otherwise qualified" for the program, then the defendants are forbidden from excluding him *by reason of his disability*. Yeskey has "no right to more services than the able-bodied inmates, but [he has] a right, if the Act is given

its natural meaning, not to be treated even worse than those more fortunate inmates." *Crawford*, 115 F.3d at 486.

C. Congress May Regulate Discrimination In Prison Under The Commerce Clause.

Petitioners do not dispute Congress's finding that discrimination against individuals with disabilities has a substantial effect on interstate commerce, and they concede that "some aspects of state prison administration do affect interstate commerce and can be regulated by Congress."⁴² Pet. Brf. 23 n.7. The undisputed congressional findings and Petitioners' concession defeats their argument that the ADA is an invalid exercise of the commerce power with respect to prisons.

This is not a case where Congress regulated purely local conduct—simple possession by any person of a gun near a school—that had nothing to do with commerce. See *United States v. Lopez*, 514 U.S.—, 131 L. Ed. 2d 626, 632 (1995). Here the Boot Camp is specifically designed to reintegrate prisoners into the stream of commerce. Because of Yeskey's disability, Petitioners deprived him of the opportunity to work on public projects, to obtain treatment and to be trained so that he could find work upon release. Cf. PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997). The nexus between the state's discrimination and commerce is clear.

Nor did Congress fail to make findings or collect data on the effect of disability discrimination on interstate commerce. Cf. *Lopez*, 131 L. Ed. 2d at 639-40. Because Congress rationally found that disability discrimination has a direct and immediate effect on interstate commerce,⁴³ it

⁴²There are good reasons for this position. In Pennsylvania alone, spending on state prisons exceeded \$1 billion ten years ago (Pet. Brf. at 9 n.1) and in 1996 the state's prison industries sold goods worth \$33 million. CORRECTIONAL INDUSTRIES ASSOCIATION, 1997 DIRECTORY: PRODUCING PRODUCTIVE PEOPLE 79 (1997).

⁴³Congress found that "the continuing existence of unfair and (continued...)

had the authority to ban such discrimination in prisons, which are a multi-billion dollar industry, as an "essential part of a larger regulation of economic activity" *Id.* at 638-39.

Petitioners' primary argument is that Congress does not have the authority to regulate discrimination in state prisons. See *Printz v. United States*, —U.S.—, 138 L. Ed. 2d 914, 942-45 (1997); *New York v. United States*, 505 U.S. 144, 161, 168-69, 188 (1991). Of course, the Court need not decide this issue because the ADA is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, which was specifically designed to intrude on the sovereign powers of the States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

If the Court does reach this issue, Petitioners' argument fails. Both *Printz* and *New York* stand for the narrow proposition that federal legislation cannot compel the States to "enact or enforce a federal regulatory program." *Printz*, 138 L. Ed. 2d at 944; *New York*, 505 U.S. at 161. The ADA does not "press [state officials] into federal service." *Printz*, 138 L. Ed. 2d at 966 (Stevens, J., dissenting); see *id.* at 940. Nor is it, like the statute in *New York*, a "formal command from the National Government directing the State to enact a certain policy." *United States v. Lopez*, 131 L. Ed. 2d at 653 (Kennedy, J., concurring).

In short, the ADA constitutionally prohibits the States from discriminating and requires them to take certain actions to prevent future discrimination. It does not cross the constitutional line by, for example, requiring the States to operate a motivational boot camp for federal prisoners. Thus, the ADA is well within Congress's authority under

⁴³(...continued)

unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity," thus necessitating "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(a)(9), (b) (emphasis added).

the Commerce and Supremacy Clauses to pass laws of general application that displace or pre-empt state laws and policies. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-90 (1981).

CONCLUSION

For the reasons noted above, the Court should affirm the judgment of the Third Circuit.

Respectfully submitted,

DONALD SPECTER
Counsel of Record
PRISON LAW OFFICE

EVE H. CERVANTEZ
KRISTAN S. MAYER
HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation

- ARLENE MAYERSON
DISABILITY RIGHTS EDUCATION AND
DEFENSE FUND

JOHN V. WADSWORTH
MCCUTCHEN, DOYLE, BROWN &
ENERSEN, LLP

Attorneys for Respondent Ronald R. Yeskey

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APPENDIX

AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. §§12111, 12201, 12202, 12208, 12210

Subchapter I - Employment

42 U.S.C. §12111. Definitions

As used in this subchapter:

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

Subchapter IV - Miscellaneous Provisions

42 U.S.C. §12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. §12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. §12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

42 U.S.C. §12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. §801 et seq.]. Such term does not include the

use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. §801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. §812].

CODE OF FEDERAL REGULATIONS

28 C.F.R. Ch. 1 (7-1-97 Edition)

**PART 35—NONDISCRIMINATION ON
THE BASIS OF DISABILITY IN STATE AND
LOCAL GOVERNMENT SERVICES**

Subpart A—General

28 C.F.R. §35.104

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Subpart D—Program Accessibility

28 C.F.R. §35.149 Discrimination prohibited.

Except as otherwise provided in §35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any public entity.

28 C.F.R. §35.151 New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a

manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities except that the elevator exception contained in section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic properties.*

(1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of §35.150.

(e) *Curb ramps.*

(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other

sloped areas at intersections to streets, roads or highways.

28 C.F.R. §35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

Subpart G—Designated Agencies

28 C.F.R. §35.190 Designated agencies.

(b)(6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local

government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

**Appendix A to Part 35—Preamble To Regulation
On Nondiscrimination On The Basis Of Disability
In State And Local Government Services
(Published July 26, 1991)**

Excerpt from 28 C.F.R. Pt. 35, App. A, pp.472-73

“Qualified Individual with a disability.” The definition of “qualified individual with a disability” is taken from section 201(2) of the Act, which is derived from the definition of “qualified handicapped person” in the Department of Health and Human Services’ regulation implementing section 504 (45 CFR §84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment (“a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question”) with the definition for other services at 45 CFR 84.3(k)(4) (“a handicapped person who meets the essential eligibility requirements for the receipt of such services”).

Some commenters requested clarification of the term “essential eligibility requirements.” Because of the variety of situations in which an individual’s qualifications will be at issue, it is not possible to include more specific criteria in the definition. The “essential eligibility requirements” for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only “eligibility requirement” for receipt of such information would be the request for it. Where such information is provided by telephone, even the ability to use a voice telephone is not an “essential eligibility requirement,” because §35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

For other activities, identification of the “essential eligibility requirements” may be more complex. Where questions of safety are involved, the principles established in §36.208 of the Department’s regulation implementing title III of the ADA, to be codified at 28 CFR, part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.

A “direct threat” is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be “qualified,” if reasonable modifications to the public entity’s policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes or unfounded fear, while giving

appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

Excerpt from 28 C.F.R. Pt. 35, App. A, p.477

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see §35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will be applicable to its interpretation. In *Southeastern Community College v. Davis*, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," *id.* Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

Excerpt from 28 C.F.R. Pt. 35, App. A, p.478

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

Excerpt from 28 C.F.R. Pt. 35, App. A, p.484

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The requirements of §35.151 for alterations apply to structural changes undertaken to comply with this section. The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

**PART 39—ENFORCEMENT OF NONDISCRIMINATION
ON THE BASIS OF HANDICAP IN PROGRAMS OR
ACTIVITIES CONDUCTED BY THE DEPARTMENT
OF JUSTICE**

28 C.F.R. §39.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its

entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §39.150(a) would result in such alterations or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and alteration of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in

achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by December 10, 1984, except that where structural changes in facilities are undertaken, such changes shall be made by October 11, 1987, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by April 11, 1985, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

28 C.F.R. §39.170 Compliance procedures.

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) *Employment complaints.* The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) *Responsible Official.* The Responsible Official shall coordinate implementation of this section.

(d) *Filing a complaint.*

(1) *Who may file.*

(i) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself or by his or her authorized representative file a complaint with the Official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR part 542.

(2) *Confidentiality.* The Official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written

authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) *When to file.* Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

Excerpt from 28 C.F.R. Pt. 39, Editorial Note, p.685

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Department has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504. The regulation will become effective on October 11, 1984.

This rule applies to all programs and activities conducted by the Department of Justice. Thus, this rule regulates the activities of over 30 separate subunits in the Department, including, for example, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Bureau of Prisons, Federal Prison Industries, and the United States Attorneys.

Excerpt from 28 C.F.R. Pt. 39, Editorial Note, p.686

Section 39.102 Application

The regulation applies to all programs or activities conducted by the Department of Justice. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the Department for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or Interviews) and the public's use of the Department's facilities (cafeteria, library). Activities in the second category include programs that provide Federal services or benefits (immigration activities, operation of the Federal prison system). No comments were received on this section.

**PART 41—IMPLEMENTATION OF EXECUTIVE
ORDER 12250, NON-DISCRIMINATION
ON THE BASIS OF HANDICAP IN FEDERALLY
ASSISTED PROGRAMS**

Subpart A—Federal Agency Responsibilities

28 C.F.R. §41.4 Issuance of agency regulations

(a) Each agency shall issue, after notice and opportunity for comment, a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part.

(b) Each agency shall issue a notice of proposed rulemaking no later than 90 days after the effective date of this part. Each agency shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation: *Provided*, That the agency shall submit its proposed final regulation to the Assistant

Attorney General, Civil Rights Division, Department of Justice, for review at least 45 days before it is to be issued.

(c) Each such agency regulation shall:

(1) Define appropriate terms, consistent with the definitions set forth in §41.3 and with the standards for determining who are handicapped persons set forth in subpart B of this part; and

(2) Prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits, or services, consistent with the guidelines set forth in subpart C of this part.

The regulation shall include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency.

**PART 42—NONDISCRIMINATION;
EQUAL EMPLOYMENT OPPORTUNITY;
POLICIES AND PROCEDURES**

**Subpart G—Nondiscrimination Based On Handicap
In Federally Assisted Programs—Implementation Of
Section 504 Of The Rehabilitation Act Of 1973**

28 C.F.R. §42.522 New construction

(a) *Design and construction.* Each new facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this subpart. Any alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner. Any alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner.

(b) *Conformance with Uniform Federal Accessibility Standards.*

(1) Effective as of March 7, 1988, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

28 C.F.R. §42.540 Definitions

(h) The term *program* means the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections.

(j) *Benefit* includes provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, sentencing, confinement, or other prescription of conduct).

36 C.F.R. Pt. 1191

**ARCHITECTURAL AND TRANSPORTATION
BARRIERS COMPLIANCE BOARD**

**Americans With Disabilities Act (ADA) Accessibility
Guidelines For Buildings And Facilities;
State And Local Government Facilities**

12. Detention And Correctional Facilities.

12.1* General. This section applies to jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons. Except as specified in this section, detention and correctional facilities shall comply with the applicable requirements of section 4. All common use areas serving accessible cells or rooms and all public use areas are required to be designed and constructed to comply with section 4.

EXCEPTIONS: Requirements for areas of rescue assistance in 4.1.3(9), 4.3.10, and 4.3.11 do not apply. Compliance with requirements for elevators in 4.1.3(5) and stairs 4.1.3(4) is not required in multi-story housing facilities where accessible cells or rooms, all common use areas serving them, and all public use areas are on an accessible route. Compliance with 4.1.3(16) is not required in areas other than public use areas.

12.2 Entrances and Security Systems.

12.2.1* Entrances. Entrances used by the public, including those that are secured, shall be accessible as required by 4.1.3(8).

EXCEPTION: Compliance with 4.13.9, 4.13.10, 4.13.11 and 4.13.12 is not required at entrances, doors, or doorways that are operated only by security personnel or where security requirements prohibit full compliance with these provisions.

12.2.2 Security Systems. Where security systems are provided at public or other entrances required to be accessible by 12.2.1 or 12.2.2, an accessible route complying with 4.3 shall be provided through fixed security barriers. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent circulation path.

12.3* Visiting Areas. In non-contact visiting areas where inmates or detainees are separated from visitors, the following elements, where provided, shall be accessible and located on an accessible route complying with 4.3:

(1) Cubicles and Counters. Five percent, but not less than one, of fixed cubicles shall comply with 4.32 on both the visitor and detainee or inmate sides. Where counters are provided, a portion at least 36 in (915 mm) in length shall comply with 4.32 on both the visitor and detainee or inmate sides.

EXCEPTION: At non-contact visiting areas not serving accessible cells or rooms, the requirements of 12.3(1) do not apply to the inmate or detainee side of cubicles or counters.

(2) Partitions. Solid partitions or security glazing separating visitors from inmates or detainees shall comply with 7.2(3).

12.4 Holding and Housing Cells or Rooms: Minimum Number.

12.4.1* Holding Cells and General Housing Cells or Rooms. At least two percent, but not less than one, of the total number of housing or holding cells or rooms provided in a facility shall comply with 12.5.

12.4.2* Special Holding and Housing Cells or Rooms. In addition to the requirements of 12.4.1, where special holding or housing cells or rooms are provided, at least one serving each purpose shall comply with 12.5. An accessible

special holding or housing cell or room may serve more than one purpose. Cells or rooms subject to this requirement include, but are not limited to, those used for purposes of orientation, protective custody, administrative or disciplinary detention or segregation, detoxification, and medical isolation.

EXCEPTION: Cells or rooms specially designed without protrusions and to be used solely for purposes of suicide prevention are exempt from the requirement for grab bars at water closets in 4.16.4.

12.4.3* Accessible Cells or Rooms for Persons with Hearing Impairments. In addition to the requirements of 12.4.1, two percent, but not less than one, of general housing or holding cells or rooms equipped with audible emergency warning systems or permanently installed telephones within the cell or room shall comply with the applicable requirements of 12.6.

12.4.4 Medical Care Facilities. Medical care facilities providing physical or medical treatment or care shall comply with the applicable requirements of section 6.1, 6.3 and 6.4, if persons may need assistance in emergencies and the period of stay may exceed 24 hours. Patient bedrooms or cells required to be accessible under 6.1 and 6.3 shall be provided in addition to any medical isolation cells required to be accessible under 12.4.2.

12.4.5 Alterations to Cells or Rooms. (Reserved.)

12.5 Requirements for Accessible Cells or Rooms.

12.5.1 General. Cells or rooms required to be accessible by 12.4 shall comply with 12.5.

12.5.2* Minimum Requirements. Accessible cells or rooms shall be on an accessible route complying with 4.3. Where provided to serve accessible housing or holding cells or rooms, the following elements or spaces shall be accessible and connected by an accessible route.

(1) **Doors and Doorways.** All doors and doorways on an accessible route shall comply with 4.13.

EXCEPTION: Compliance with 4.13.9, 4.13.10, 4.13.11 and 4.13.12 is not required at entrances, doors, or doorways that are operated only by security personnel or where security requirements prohibit full compliance with these provisions.

(2)* **Toilet and Bathing Facilities.** At least one toilet facility shall comply with 4.22 and one bathing facility shall comply with 4.23. Privacy screens shall not intrude on the clear floor space required for fixtures and the accessible route.

(3)* **Beds.** Beds shall have maneuvering space at least 36 in (915 mm) wide along one side. Where more than one bed is provided in a room or cell, the maneuvering space provided at adjacent beds may overlap.

(4) **Drinking Fountains and Water Coolers.** At least one drinking fountain shall comply with 4.15.

(5) **Fixed or Built-in Seating or Tables.** Fixed or built-in seating, tables and counters shall comply with 4.32.

(6) **Fixed Benches.** At least one fixed bench shall be mounted at 17 in to 19 in (430 mm to 485 mm) above the finish floor and provide back support (e.g., attachment to wall). The structural strength of the bench attachments shall comply with 4.26.3.

(7) **Storage.** Fixed or built-in storage facilities, such as cabinets, shelves, closets, and drawers, shall contain storage space complying with 4.25.

(8) **Controls.** All controls intended for operation by inmates shall comply with 4.27.

(9) **Accommodations for persons with hearing impairments** required by 12.4.3 and complying with 12.6 shall be provided in accessible cells or rooms.

12.6 Visible Alarms and Telephones. Where audible emergency warning systems are provided to serve the occupants of holding or housing cells or rooms, visual alarms complying with 4.28.4 shall be provided. Where permanently installed telephones are provided within holding or housing cells or rooms, they shall have volume controls complying with 4.31.5.

EXCEPTION: Visual alarms are not required where inmates or detainees are not allowed independent means of egress.

Published in *Federal Register*, Vol. 63, No. 8 (January 13, 1998)

41 C.F.R. Ch. 101 (7-1-97 Edition)

Appendix A to Subpart 101-19.6—Uniform Federal Accessibility Standards.

I. Purpose.

This document sets standards for facility accessibility by physically handicapped persons for Federal and federally-funded facilities. These standards are to be applied during the design, construction, and alteration of buildings and facilities to the extent required by the Architectural Barriers Act of 1968, as amended.

The technical provisions of these standards are the same as those of the American National Standard Institute's document A171.1-1980, except as noted in this text and on figures by italics.

4.1.4

• • • •

(9) *Institutional.* Institutional occupancy include among others, the use of a building or structure, or portion thereof, in which people have physical or medical treatment or care, or in which the liberty of the occupants is restricted. Institutional occupancies shall include the following subgroups:

* * * *

(c) Institutional occupancies where the occupants are under some degree of restraint or restriction for security reasons including:

Facilities	Application
Jails	5 percent of residential units available, or at least one unit, whichever is greater; all common use, visitor use, or areas which may result in employment of physically handicapped persons.
Prisons	
Reformatories	
Other detention or correctional facilities	

Excerpts from *Federal Register*, Vol. 45, No. 108
(June 3, 1980)

28 C.F.R. Pt. 42

Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914

Excerpt from p.37,621

The use of qualified interpreters in various settings (e.g., police interrogations, court proceedings, correctional rehabilitation programs) who are, when possible, certified by a recognized certification agency, is another important method of ameliorating the communications barriers experienced by speaking and hearing impaired individuals. A recipient's need for an interpreter is usually not on a continuing basis, and the overall compliance cost would not be substantial.

Excerpt from p.37,627

Appendix B—Analysis of Final Rule.

A. General Provisions.

This subpart prohibits discrimination on the basis of handicap in any program, activity or facility receiving Federal financial assistance (§42.501). Section 504 protects not only the ultimate beneficiaries of Federal assistance statutes (e.g. students, prisoners, general public) as identified in the Federal grant statutes) directly or by inference, but also nonbeneficiary participants (e.g., employees working in the program receiving Federal financial assistance regardless of whether a primary objective of the Federal assistance includes providing employment opportunities). The subpart applies to all Federal assistance programs administered by the Department and requires all recipients of such assistance to comply with the requirements of the subpart (§42.502). The subpart not only applies to grants, contracts and cooperative agreements entered into after the effective date of the subpart, but also applies to any Federal financial assistance previously extended which continues at the time the subpart becomes effective.

Excerpt from p.37,630

2. *Detention and Correctional Agencies and Facilities.* These agencies include jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities. Where local or State policy prohibits the detention or incarceration of wheelchair users, no structural modification to detention or correctional facilities to accommodate wheelchair users is required. Where there is no such exclusionary policy, structural modifications may be unnecessary where alternate accessible facilities are available (e.g., short term detention in the prisoner's home or at a medical facility). Where local policy precludes alternate detention facilities, a detention

agency would be required to make structural modifications to accommodate detainees or prisoners in wheelchairs. In such circumstances, however, not every detention facility of the agency would have to become accessible. Only a sufficient number of detention cells need to be accessible to wheelchair users as can be reasonably expected to be detained based on the agency's prior experience. A different problem arises, however, when accessibility requirements are imposed on small, independently operated community based facilities used, for example, for the placement of juveniles in a home setting. A metropolitan area may have a number of such homes. Each such home receiving assistance from the Department with fewer than fifteen employees is not required to be accessible to handicapped persons as long as a sufficient number of homes are accessible in the service area. If a home, after consultation with the handicapped person concerned, determines that its facilities are not accessible to such person because of the person's handicapping condition, it is the responsibility of the home to locate an accessible home providing equivalent services (§42.522(c)).

All detention and correctional agencies must provide accessibility for handicapped visitors (*e.g.*, accessible visiting rooms, restrooms) since the prisoner's right to receive visitors is an element of the program administered by the agencies. Where a facility's visitation area is inaccessible to the handicapped, a detention or correctional agency has the option to (a) house the prisoner in a facility which is accessible to handicapped visitors, (b) move the prisoner to an alternate, accessible area either within or outside the facility for visits from wheelchair users, (c) make structural modifications to make the visitation area accessible. It should be kept in mind that the benefit provided is the right to visit rather than the right to visit in any particular area.

Facilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining area, recreation areas, work areas, and chapels, must be readily accessible

to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. For example, correctional agencies should provide for the availability of qualified interpreters (certified, where possible, by a recognized certification agency) to enable hearing impaired inmates to participate on an equal basis with nonhandicapped inmates in the rehabilitation programs offered by the correctional agencies (*e.g.*, educational programs).

Correctional officials should take into account any handicaps which inmates may have in classifying them. In making housing and program assignments, such officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate.

**Excerpt from
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
QUEHANNA BOOTCAMP INMATE HANDBOOK**

Excerpt from pp.47-50

**Inmate Program Schedule (Mon - Fri)
Quehanna Boot Camp**

05:30 Wake Up Call

05:35 Official Count

Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

05:50 Physical Training

All inmates will be dressed in their physical training attire, have their bunks made, and standing at the designated count position. Staff, normally the Area Commander or the Sergeant, will have the inmates fall out for formation and will march the inmates to an appropriate location and supervise a twenty to thirty minute calisthenics period. Staff will then run with the inmates for twenty to thirty minutes.

All inmates requesting sick call will be directed to wait in the visiting room until the screening begins.

06:30 All inmates will be marched to their rooms to shower, shave, and dress in the appropriate uniform of the day.

07:00 Breakfast Meal - Medication Call - Room inspection.

The call for breakfast meal will be by an assigned rotation schedule which is based on competition between the squads in inspections. After eating the breakfast meal, each inmate will return to their

room and wait there until the next organized movement. All inmates will be marched to the Food Service Department for meals.

Inmates will proceed to the medical office to receive prescribed medication after eating the morning meal.

All inmates will be standing in their designated count position once the command "Stand By For Inspection" is announced. They will be called to the position of "Attention" once the inspection begins. Inmates will be dressed in the "Uniform of the Day." Shirts will be tucked in, and footwear (boots) will be shined and properly laced. The uniform will be neat, clean and pressed. All personal items will be stored in the proper location within the lockers (see diagram). The bunks will have two sheets, one blanket, one pillow, one pillow case and one mattress.

08:00 Flag Ceremony

Staff will have the inmates fall out for formation and will march the inmates to the flag pole. The National Flag will be unfolded and hoisted to the top of the flag pole followed by the State Flag and the Department of Corrections Flag, using the same procedures as the National Flag.

08:30 Work Assignments.

08:40 Inmates will be broken down by squads and assigned work with a Labor Foreman or other duties within the Main Complex.

11:30 Morning Session of Work Programs End

Inmates working in the field will be fed in the field. Inmates working at the Main Complex will be marched to their rooms to clean up and wait for the lunch meal.

11:45 Lunch Meal - Medication Call

Inmates will be marched to the Dining Room based on the established meal rotation for the day. Before being called for the meal and after eating the meal, inmates will remain in their room and work on studies, sanitation, and other required activities. Inmates working in the field will be fed directly after the official count is completed.

12:45 Official Count

The official count will be taken immediately after the lunch meal. Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

13:00 Work Crew Assignments/GED Education/Islamic Church services on Fridays only.

All inmates will be marched to their work area and continue their work assignments.

14:15 DATS Counselling Session - individual or group

If an inmate is scheduled for Treatment Program he will receive a pass from the 6 - 2 Housing Unit Officer after inspection. The inmate will notify his Work Supervisor (Labor Foreman or Kitchen Staff) of the appointment when reporting for the work assignment at 08:40 hours. The Work Supervisor will sign the pass and direct the inmate to his appointment. All inmates must take the most direct route to the appointment by not entering unauthorized areas without permission.

15:25 Afternoon session of work and treatment programs end.

15:30 Showers

Inmates are marched to their rooms to take their daily shower and change into the evening uniform

(brown pants, white shirt, and brown tie and dress boots).

15:50 Flag Ceremony

16:00 Supper Meal - Medication Call

Inmates will be marched to the dining room based on the established meal rotation for the day. Inmates will remain in their rooms until called to the dining room and will return to their room after eating. Before being walked for the meal and after eating the meal, inmates will remain in their room polishing their work boots and getting ready for the evening treatment programs. Count will be taken immediately following completion of the evening meal.

17:00 Official Count

Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

17:15 Community Meeting/GED Education

Inmates will be marched to the conference room. The foundation of the treatment program emphasizes community living and socialization skills. Each platoon lives as a team, meeting daily in community meetings to resolve problems and reflect on their progress in the program. The core of this community is designed for inmates to practice behaviors which will help them to develop and to seek realistic goals through honest effort.

17:45 Educational Programming and Treatment Programs

A substance abuse program includes education, self-help, support groups, group and individual therapy. Inmates participate in classroom and treatment sessions several times each week throughout their six month program. Sessions are related to changing attitudes and habits of

substance abuse, based on the philosophy of abstinence and recovery.

20:30 Individual counseling w/DATS and individual study time.

All inmates will be in their rooms working on educational and treatment booklets, studies, and other assigned activities unless meeting with a DATS.

21:00 Official Count

Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

21:10 Individual Time

All inmates will be in their rooms working on their laundry, ironing, sanitation, letter writing, shining boots, working on studies and other required activities.

21:15 Medication Call

Inmates will proceed to the Registered Nurse's Office to receive prescribed medication after count clears.

21:30 Lights Out

The room lights are turned out. All inmates remain in their bunks unless using the toilet.

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No. 97-634

Supreme Court, U.S.
FILED

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(*Counsel of Record*)

SYNDI L. GUIDO
Deputy General Counsel
Office of General Counsel
333 Market Street
17th Floor
Harrisburg, PA 17101
Telephone (717) 783-6563
Counsel for Petitioners

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On Writ of Certiorari to the United States
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ARGUMENT

I. PRISON MANAGEMENT IS NOT JUST A TRADITIONAL STATE FUNCTION, IT IS ONE OF THE MOST FUNDAMENTAL ASPECTS OF STATE SOVEREIGNTY.

The appropriate outcome of this case turns on the fact that Pennsylvania has a sovereign right to manage its own prisoners. In apparent recognition of this fact, respondent and his amici have attempted to minimize Pennsylvania's interest to the point of absurdity. According to respondent, "while management of state prison inmates is a function traditionally performed by states, it is not a fundamental attribute of state sovereignty." (Respondent's Brief at 20). Nothing could be further from the truth. A state's autonomy in enforcing its

criminal code is a fundamental, *defining* aspect of sovereignty. See *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

Foremost among a state's exclusive sovereign prerogatives is the power to create and enforce a criminal code, *id.* at 93, and maintaining prisons is an essential part of that sovereign power. *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Thus, each state has the independent ability to decide what conduct to criminalize and how severe the applicable penalty should be — up to and including death. See *Heath*, 474 U.S. at 89 (explaining that a sovereign has the inherent power to determine what constitutes an offense against its authority and to punish that offense).

States are sovereign entities, separate from both the federal government and each other. *Id.* To decide whether an entity is a separate sovereignty, this Court looks at whether the entity draws its authority to punish an offender from its own distinct source of power. *Id.* at 88. The authority to create criminal laws and punish offenders is a power each state possessed before joining the Union, and that power was reserved to them by the Tenth Amendment. *Id.* at 89; *United States v. Lanza*, 260 U.S. 377, 382 (1922). State sovereignty is rooted in these facts.

The states' power to enforce their criminal laws is so fundamental that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Heath*, 474 U.S. at 89 (quoting *Lanza*, 260 U.S. at 382). Likewise, two identical offenses are not the "same offense" within the meaning of the Double Jeopardy Clause if they are prosecuted by two different states. *Id.* at 92. This Court's decision in *Heath* illustrates just how fundamental this aspect of sovereignty really is to each and every state. In that case, the Court determined that a state has the power to sentence a person to death even though another state has already sentenced that person to life in prison for committing the very same murder.¹

¹ Larry Gene Heath paid two men \$2,000 to kill his wife, Rebecca, who was nine months pregnant. The assassins kidnapped Rebecca from her home

Pennsylvania's authority to punish those who violate its laws is distinct and independent from that of the federal government and every other state in our nation.² It is this crucial power which defines Pennsylvania as a sovereign entity. Inconceivably, respondent and his amici attempt to denigrate this fundamental aspect of sovereignty as a mere "traditional" state function.³

II. TITLE II OF THE ADA TRULY IS AMBIGUOUS.

The state's operation and maintenance of prisons is part and parcel of its power to create a penal code and punish those who violate it. See *Procunier*, 416 U.S. at 412. The federal-state balance of power would clearly be altered by

in Alabama, shot her in the head, and left her corpse in Georgia. Heath was arrested in Georgia, where he pled guilty to murdering Rebecca in exchange for a life sentence. He was subsequently arrested by the Alabama authorities. Despite the earlier prosecution in Georgia, Heath was later convicted, in Alabama, for the same murder; this time, he received the death penalty. Heath's death sentence was upheld by this Court because Georgia and Alabama were deemed separate sovereigns. *Heath*, 474 U.S. at 88.

² Pennsylvania first became a proprietary colony in 1681, and its provincial legislature passed the colony's first criminal laws in 1682. Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania* 32 (1968). During its colonial period, Pennsylvania was not a sovereign entity because its laws could be vetoed by the British government. Staughton George, et al., *Charter to William Penn and Laws of the Province of Pennsylvania, 1682 — 1700* 85 (1879). Just a few weeks after the Declaration of Independence was signed in 1776, Pennsylvania's Constitutional Convention was convened. Pennsylvania became a sovereign entity when its constitution was ratified on September 28, 1776. Robert E. Woodside, *Pennsylvania Constitutional Law* 567-68 (1985). In contrast, the federal government did not become a sovereign entity until June 21, 1788, when the federal constitution was ratified by nine states, including Pennsylvania, which was the second state to ratify the Constitution. *Id.* at 17.

³ Citing *Turner v. Safley*, 482 U.S. 78, 84-85, 99-100 (1987), respondent argues that prison management must not be a "core" state function because "there always has been a place for federal oversight of state prisons." (Respondent's Brief at 21). Based on the Supremacy Clause, the federal judiciary obviously has the authority to intervene to correct violations of the federal constitution, but there has never been room for the federal government to engage in general regulatory oversight of how a state treats its own prisoners.

federal regulation of this sovereign function. In the absence of a clear congressional statement, Title II of the ADA cannot be applied to state prisoners. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Without repeating all of the arguments set forth in their opening brief, petitioners want to emphasize that the ADA is riddled with ambiguities about its application to state prisoners. Respondent supports his contrary contention with four arguments, none of which have merit.

First, Title II prohibits public entities from discriminating against the disabled by excluding them from, or denying them the benefit of, "services, programs, or activities." According to respondent, the terms "programs" and "services" are not ambiguous because Pennsylvania's Motivational Boot Camp Act refers to "programs" and "services." (Respondent's Brief at 11-12). Respondent completely misses the point that was made so cogently by the Fourth Circuit in *Amos v. Maryland Dep't of Pub. Safety and Correctional Services*, 126 F.3d 589 (4th Cir. 1997): The same word can have more than one meaning depending on the context in which it is used, and prison programs, activities, and services are different in kind than those provided to the public. *Amos*, 126 F.3d at 601. For this reason, Title II is ambiguous about its application to services, programs, and activities as those terms are understood within the unique setting of a state prison.

Respondent wants this Court to ignore that ambiguity, arguing that "the ADA does not apply only to 'services, programs, or activities'" because the second clause of § 12132 "affirmatively forbids a public entity from subjecting people with disabilities to discrimination generally." (Respondent's Brief at 12). The federal government makes a similar argument:

[T]he anti-discrimination principle of Title II is not limited to the discriminatory exclusion of individuals from, or denial of the benefits of, "services, programs, or activities." Title II also provides that no qualified person with a disability shall "be subjected to discrimination by any such [public] entity." Thus, whether or not prisons provide "services, programs,

or activities," they are prohibited from discriminating on the basis of disability by the concluding clause of Section 12132, a "catch-all phrase that prohibits all discrimination by a public entity."

(Brief of the United States at 9-10) (citations omitted). However, the true significance of the catch-all phrase in § 12132 is that it makes the statute even *more* ambiguous because the phrase is subject to two conflicting interpretations.⁴

Respondent and his amici believe the catch-all phrase means that a state and its agencies cannot discriminate against the disabled even if the particular agency does not provide any "services, programs, or activities." This is certainly one interpretation, but it is not particularly persuasive. Section 12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. If respondent is correct, and Congress meant to outlaw all discrimination against the disabled — irrespective of any relationship to services, programs, and activities provided by the agency — then the words "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity" are superfluous and can be eliminated so that § 12132 reads as follows:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity.

Yet, even under this revised version of § 12132, there is no proscription on general discrimination against the disabled.

⁴ According to *Merriam Webster's Collegiate Dictionary* 36 (10th ed. 1994), the word "ambiguous" means "doubtful or uncertain; inexplicable; capable of being understood in two or more possible senses or ways."

The statute only prohibits discrimination against a "qualified individual with a disability," which is defined as an individual who "meets the essential eligibility requirements for the receipt of *services* or the participation in *programs* or *activities* provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).

The most reasonable interpretation of § 12132 is that it only applies to services, programs, or activities provided by a state agency, but respondent and his amici interpret the provision to apply regardless of whether an agency provides any services, programs, or activities. These two conflicting interpretations demonstrate that the catch-all phrase of § 12132 renders the statute ambiguous about its application to state agencies, such as Pennsylvania's Department of Corrections, that do not provide the public with services, programs, or activities. This ambiguity is but one of several that plague the ADA.

Second, respondent argues that the term "qualified individual with a disability" is not ambiguous because it does not imply voluntariness and, therefore, does not exclude prisoners. (Respondent's Brief at 12). In making this assertion, respondent relies on the fact that Title II applies to other activities that a citizen may be compelled to participate in, such as education and jury duty. (Respondent's Brief at 13; *see also* Brief of the United States at 11).

Respondent's argument ignores the fact that the term "qualified individual" also implies the legal entitlement to receive a benefit or participate in a program, activity, or service so long as certain qualifications are met. Thus, the fact that individuals who are compelled to participate in certain activities may also be affected by Title II has no bearing on whether the statute applies to prisoners. Citizens are entitled to go to school and to serve as jurors and there are substantive limitations on the state's ability to deny participation in those activities. *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (acknowledging a student's legitimate entitlement to a public education); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)

(recognizing a citizen's right not to be discriminated against in the jury selection process); *J.E.B. v. Alabama*, 511 U.S. 127, 141 (1994) (same).

In contrast, prisoners can never be "qualified individuals" as that term is commonly understood because state prisoners simply do not enjoy the entitlements available to the general citizenry. For example, the Thirteenth Amendment, which was ratified shortly before the Fourteenth Amendment, prohibits involuntary servitude for all persons *except* those subject to punishment for violating criminal laws. U.S. Const. amend. XIII. Under the Eighth Amendment, the state is entitled to punish any prisoner so long as the punishment is not cruel or unusual. U.S. Const. amend. VIII. Prisoners can be constitutionally subjected to conditions of confinement that are harsh and unpleasant. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (explaining that restrictive and harsh prison conditions are not unconstitutional).

In addition to punishment, prisoners may be denied privileges that would otherwise be available to any citizen. Prisoners can be denied the right to vote, removed from public office, denied the freedom to associate, denied visitation, denied full enjoyment of common First Amendment liberties, and prohibited from engaging in otherwise lawful and constitutionally-protected behaviors. *See Romer v. Evans*, 517 U.S. 620 (1996) (reaffirming proposition in *Davis v. Beason*, 133 U.S. 333 (1890) that convicted felon can be denied the right to vote); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977) (it is not unconstitutional for prison regulations to curtail the right of free association); *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 464-65 (1989) (prisoner may be denied visitation rights).

Within the confines of the Constitution, states have the unfettered discretion to assign prisoners to any prison and to exclude them from programs and activities. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (unless a state places substantive limitations on an official's discretion, it has not created a constitutionally-protected interest); *Moody v. Daggett*,

429 U.S. 78, 88 n.9 (1976) (prisoners have no entitlement to participate in rehabilitative program). With respect to services, a prisoner can expect that his basic human needs will be cared for, but he can expect no more. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates'").

Under respondent's interpretation of Title II, disabled prisoners would be the *only* prisoners with a legal right to compel the benefits of, or the right to participate in, these state prison programs — a result that goes beyond prohibiting the state from discriminating against disabled prisoners. Title II would constitute an affirmative grant of substantive rights and benefits that no able-bodied state prisoner possesses. This ridiculous result underscores the fact that Congress could not have been speaking of prisoners when it used the words "qualified individuals."

Third, respondent argues that the name of Title II — Public Services — does not imply that it covers only those services provided to the general public because many public services are only provided "to those who meet certain selection criteria." (Respondent's Brief at 14). Respondent is mixing apples and oranges. It is absurd to think that prisoners are "selected" to receive a "public service."

Fourth, respondent argues that the ADA is not ambiguous in its application to inmates because both the ADA and prisons are geared toward rehabilitation. (Respondent's Brief at 14-15). In making this argument, respondent greatly exaggerates the importance of rehabilitation as an objective of state correctional systems and improperly elevates it to the level of the ADA's rehabilitative objectives.

In contrast to incarceration, the whole purpose of the ADA is to take individuals who, through no fault of their own, have been victimized by isolation and segregation and assimilate them into public life. On the other hand, the purpose of incarceration is to remove individuals from society with sev-

eral objectives in mind — punishment or retribution, deterrence, incapacitation or public protection, and rehabilitation or reformation. John J. DiIulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* 260 (1987). Significantly, prisoners are not *victims* of their isolation; they *created* the circumstance that caused them to be segregated in the first place.

To rehabilitate prisoners, segregation and isolation serve as necessary tools to ensure their *eventual* reintegration into society. Under the ADA, current segregation is not part of *eventual* integration into public life; the goal is *immediate* assimilation. Thus, respondent's contention that the statutory goals of the ADA mirror those of the boot camp is flawed. In the boot camp, as well as traditional prisons, rehabilitation is directed toward *future* integration into society, whereas the ADA is intended to provide *current* integration. These are two very different objectives.

In addition to the four arguments discussed above, respondent and his amici attempt to bolster their position by a misleading analysis of Congress's use of the term "institutionalization" in 42 U.S.C. § 12101(a)(3). Essentially, they concede the fact that the term came directly from a report issued by the United States Commission on Civil Rights, which found that discrimination persists in critical areas, such as institutionalization. United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 159 (1983). However, respondent goes on to say that the "report specifically identified the criminal justice system, including prisons, as a setting in which disability discrimination occurs." (Respondent's Brief at 26-27). The ACLU, for example, claims that the "legislative history relied upon by Petitioners demonstrates that disabled prisoners were indeed among the institutionalized groups about whom Congress was concerned." (Brief of the ACLU at 9-10 n.6. *See also* Brief of National Advisory Group for Justice, et al. at 11; Brief of the United States at 28 n.11).

Respondent and his amici do not base their contentions on the text of the Commission's report. That report is divided

into two parts, and "Institutionalization" is analyzed in sections 2 and 4 of Part I. Chapter 2, "Discrimination Against Handicapped People," and chapter 4, "The Goal of Full Participation," are broken into sections which include discussions of the following topics: Education, Employment, Institutionalization, Medical Treatment, Sterilization, Architectural Barriers, Transportation, and Other Areas. In chapter 2, the topic "Institutionalization" contains a discussion of the problem of systematically placing disabled individuals in "large-scale residential institutions for handicapped people." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 32 (1983). The "Institutionalization" portion of chapter 4 decries the fact that "segregating handicapped people in large, impersonal institutions is the most expensive means of care" and suggests that "alternative living arrangements allowing institutionalized residents to return to the community can save money." *Id.* at 78.

Respondent and his amici argue that the Commission's report also includes a discussion of prisons and prisoners. However, that claim is not based on the report itself, but on Appendix A to that report. That appendix is comprised of a list of some "major social and legal mechanisms, practices, and settings in which handicapped discrimination arises." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Appendix A at 165 (1983). Respondent and the ACLU point out various references to prisons and prisoners which are included in that list under the category pertaining to the criminal justice system. (Respondent's Brief at 26-27; Brief of the ACLU at 9-10 n.6). Respondent and his amici totally ignore the fact that the category involving the criminal justice system is completely separate from the one dealing with institutions. *See* United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Appendix A at 166, 168 (1983). Moreover, the preamble to Appendix A explicitly states that the "items listed are issue areas in which problems of discrimination occur, however, no implication is intended that the listed practices are necessarily discriminatory." *Id.*, Appendix A at 165 (emphasis added).

The conclusions in the Commission's report include a finding that serious and pervasive discrimination against the disabled persists in such critical areas as "education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation." *Id.* at 159. The criminal justice system — including prisons, prisoners, and detainees — is noticeably absent from this list.

In § 12101(a)(3), Congress explicitly found that persistent discrimination exists in all of the categories delineated in the Commission's conclusions, except for involuntary sterilization. Congress also found persistent discrimination in some of the other categories contained in the Commission's appendix, such as voting and housing, but Congress chose *not* to include the criminal justice system in § 12101(a)(3) — even though prisons and prisoners were specifically included in that category of the appendix. Under the circumstances, it is difficult to fathom how respondent and his amici can contend that the term "institutionalization" has *anything* to do with prisons or prisoners.

III. INCLUDING STATE PRISONERS WITHIN THE SCOPE OF TITLE II'S PROTECTIONS IS AN UNCONSTITUTIONAL INTERPRETATION OF THE ADA.

As both respondent and the federal government concede, this Court must interpret statutes in light of the Constitution. (Respondent's Brief at 19; Brief of the United States at 19-20 n.6). Petitioner does not suggest that this Court hold that the ADA is unconstitutional *per se*; rather, if the ADA is read as respondent suggests, it will be unconstitutional. Congress does not have the power under the Fourteenth Amendment or the Commerce Clause to apply Title II of the ADA to state prisoners.⁵

⁵ This is not to say that the rights of disabled prisoners will go unprotected. As Professor Hamilton recently pointed out, "There is no vacuum of power outside Congress's limited powers. Rather, when it exceeds its limited powers, it strays into domains reserved for other branches, the states, or the people." Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 Wm. & Mary L. Rev. 699, 709 (1998).

A. The Fourteenth Amendment

Respondent and his amici maintain that Congress was authorized to enact Title II of the ADA under its power to enforce the Fourteenth Amendment. They argue that the ADA is legislation that is necessary and proper to remedy and deter unconstitutional discrimination against the disabled. (Respondent's Brief at 35-36; Brief of the United States at 22).⁶

Section 5 of the Fourteenth Amendment gives Congress the power to remedy *constitutional* violations; it does not give Congress the power to create new substantive rights unless they somehow remedy a constitutional violation. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act — "RFRA" — as an unconstitutional exercise of Congress's power to enforce the Fourteenth Amendment). Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding remedial provisions of the Voting Rights Act of 1965 to "banish the blight" of almost 100 years of racial discrimination in voting) with *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (concluding that Congress had exceeded its enforcement authority by lowering the minimum voting age in state and local elections from 21 to 18).

Respondent mistakenly believes that Congress can raise the level of judicial scrutiny without changing the substantive meaning of a constitutional right. (Respondent's Brief at 39). What respondent fails to recognize is that raising the level of judicial scrutiny *necessarily* expands the substance of a constitutional right by protecting an individual from conduct that would otherwise be constitutional. In this regard, petitioners recognize that "legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 117 S. Ct.

⁶ As this Court pointed out in *Printz v. United States*, 117 S. Ct. 2365, 2378 (1997), the Necessary and Proper Clause is the "last, best hope of those who defend *ultra vires* congressional action."

at 2163; *South Carolina v. Katzenbach*, 383 U.S. at 308 (finding that the "pervasive evil" of racial discrimination in voting was remedied through elimination of literacy tests that were otherwise constitutional). Thus, Congress can outlaw otherwise constitutional conduct, *provided* that the legislation is needed to remedy some *constitutional* violation.⁷ See *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (holding that Congress could prohibit certain electoral schemes that were not unconstitutional themselves but that were discriminatory in effect).

Respondent and his amici argue that Title II of the ADA was needed to remedy violations of the equal protection clause. However, Title II does not remedy such violations because disabled people are not a suspect class for which the Constitution requires mandatory accommodation. Congress may be able to give disabled individuals statutory rights that exceed those granted by the equal protection clause, but it may not do so under the guise of enforcing constitutional rights that do not exist.

In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), this Court refused to recognize the disabled as a suspect or quasi-suspect class,⁸ setting the outer bounds of Congress's remedial power to protect them from unconstitutional discrimination. In *Turner v. Safley*, 482 U.S. 78 (1987), this Court determined that even when the highest level of scrutiny would otherwise apply, prison regulations are valid as long as

⁷ In arguing that the ADA should be "upheld as a valid exercise of Congress's Section 5 power if there is a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" the federal government is putting the cart before the horse. (See Brief of the United States at 22). The *first* inquiry is whether there is a constitutional violation to be prevented or remedied. If the injury being prevented or remedied does not rise to the level of a constitutional violation, the means adopted to address that end are irrelevant.

⁸ Although *City of Cleburne* specifically dealt with the mentally disabled, it identified the disabled generally as a nonsuspect class for purposes of equal protection analysis. 473 U.S. at 445-46.

they bear a reasonable relationship to a legitimate penological interest. *Turner*, 482 U.S. at 89.⁹

Just as RFRA attempted to make a substantive alteration of this Court's holding in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Title II's application to state prisoners would make a substantive alteration to this Court's holdings in *City of Cleburne* and *Turner*. RFRA's similarity to the ADA is striking. Both purportedly establish greater rights for individuals by increasing the judicial scrutiny of state action to a level higher than this Court has deemed appropriate.

The ADA heightens judicial scrutiny applicable to actions affecting disabled persons by requiring a closer nexus between the governmental purpose and the governmental means than presently exists under the rational basis test. The ADA mandates an affirmative justification for any state action that incidentally burdens the disabled, a nonsuspect class. A state's actions are no longer presumptively valid despite a rational relationship to a legitimate state interest. Even if the state's chosen policy passes the rational basis test, it will not be validated by the courts unless the state can affirmatively prove that it cannot make an accommodation without altering the fundamental nature of its programs, activities, and services. This searching judicial scrutiny is incompatible with the less onerous rational basis test.

The same problems that this Court found insurmountable in RFRA also pervade Title II of the ADA. See *City of Boerne*, 117 S. Ct. at 2171. In striking down RFRA, this Court might as well have been speaking about the ADA. See, e.g., *Coolbaugh v. Louisiana*, No. 96-30664, 1998 U.S. App. LEXIS

⁹ There are two reasons for this judicial restraint. First, prison administration is a task that has been committed to the legislative and executive branches of government. *Turner*, 482 U.S. at 85. Thus, with respect to federal prisons, deference must be given to Congress and the Department of Justice. With respect to state prisons, however, this Court has recognized that our federalist system provides an additional reason for deference to state prison administrators. *Id.* Thus, state prison management should be left to the state legislative and executive branches of government.

3199, at *31 (5th Cir. Feb. 27, 1998) (Smith, J., dissenting). RFRA was not a constitutional exercise of Congress's power to enforce the Fourteenth Amendment, and neither is Title II of the ADA.

B. The Commerce Clause

Even though Title II of the ADA does not constitute an appropriate exercise of Congress's power to enforce the Fourteenth Amendment, it is not necessarily unconstitutional in its entirety. When applied to many public services, Title II may be a constitutional exercise of Congress's powers under the Commerce Clause. However, Title II cannot be constitutionally interpreted in a way that authorizes federal regulation of state prison management, a noncommercial activity that does not substantially affect interstate commerce.

Contrary to respondent's contention, Pennsylvania's boot camp is not "specifically designed to reintegrate prisoners into the stream of commerce." (Respondent's Brief at 46). The boot camp is specifically designed to (1) reduce the number of individuals who commit drug and alcohol related crimes, which is a primary cause of prison overcrowding; (2) eliminate insurrection and prison rioting, which are caused by overcrowding; and (3) reduce criminal behavior by exploring alternative methods of incarceration. Pa. Stat. Ann. tit. 61, § 1122 (West Supp. 1997). In fact, a state's management of its prisoners has no substantial effect on interstate commerce that is "visible to the naked eye." See *United States v. Lopez*, 514 U.S. 549, 562 (1995).

Like the federal government's argument that was rejected in *Lopez*, one cannot conclude that prison management and inmate classifications substantially affect interstate commerce without piling inference upon inference upon inference. See *id.* at 567. Respondent does not bother to explain the basis for his conclusion that assignment to Pennsylvania's boot camp substantially affects interstate commerce. However, it is only through a tortured process of conjecture that one can reach the theoretical conclusion that a prisoner's assignment to the boot camp may ever substantially affect interstate commerce.

That speculative hypothesis requires one to start with the premise that assignment to the boot camp gives an individual the opportunity to receive drug and alcohol treatment, intensive discipline and regimentation, continuing education, vocational training, prerelease counseling, engage in rigorous physical activity, and work on public projects. From that point forward, a long series of facts must be assumed, although those events may never take place.

To begin with, it must be taken for granted that the inmate will successfully complete the boot camp's requirements because he has received the education, discipline, regimentation, training, and counseling provided in the boot camp. If he does complete those requirements, the inmate will be paroled and released into the local community under the supervision of the Board of Probation and Parole. One must assume that, as a result of the drug and alcohol treatment the inmate received at the boot camp, he will not use those substances after he is released into free society. Inasmuch as he probably will not use those substances anymore, the parolee should not test positive on random drug or alcohol tests conducted during the period of parole supervision. Because the individual received intensive discipline and regimentation and was required to engage in rigorous physical activity, he will — hopefully — have developed a sense of personal responsibility, self-discipline, and respect for others. Theoretically, these qualities, combined with the fact that he no longer uses drugs or alcohol, will prevent the individual from committing another crime and being returned to prison. Ideally, since the individual has received continuing education, vocational training, and prerelease counseling at the boot camp, he will have learned the skills and work ethic necessary to find and maintain a job, which will have an incidental effect on interstate commerce. Eventually, if enough inmates successfully complete the boot camp and become more productive citizens, the effect on interstate commerce might conceivably be a substantial one.

If this type of logic can be used to find that participation in the boot camp substantially affects interstate commerce,

then Congress would also have the power to dictate the boot camp's eligibility requirements. By dictating eligibility requirements, Congress would be able to change the sentencing alternatives available for violations of state law. This is a slippery slope that directly threatens the vital balance of power between the state and federal governments. In *Lopez*, this Court rejected nearly identical reasoning because, otherwise, it would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. This case is virtually indistinguishable from *Lopez*, and the federal government has not even attempted to distinguish this case from that one. (See Brief of the United States at 20-21 n.7). This Court should not allow Congress to use its Commerce Clause powers to invade a fundamental area of state sovereignty which has no substantial effect on interstate commerce.

CONCLUSION

For the foregoing reasons, in addition to those set forth in their opening brief, petitioners respectfully ask this Court to reverse the decision of the lower court and remand with instructions to affirm the judgment of the district court, which dismissed this action in its entirety.

Respectfully submitted,

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(*Counsel of Record*)

SYNDI L. GUIDO
Deputy General Counsel

Office of General Counsel
333 Market Street
17th Floor
Harrisburg, PA 17101
(717) 783-6563

April 14, 1998

Counsel for Petitioners

MAR 13 1998

CLERK

(16)
No. 97-634

**In the Supreme Court
of the
United States**

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

*On A Writ Of Certiorari
To The United States
Court Of Appeals For The Third Circuit*

**OPPOSITION TO MOTION FOR LEAVE
TO FILE A BRIEF AMICUS CURIAE**

EVE H. CERVANTEZ (No. 164709)
HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600
Facsimile: 415/399-3041

DONALD SPECTER (No. 83925)
Counsel of Record
PRISON LAW OFFICE
General Delivery
San Quentin, California 94964
Telephone: 415/457-9144
Facsimile: 415/457-9151

Attorneys for Respondent Ronald R. Yeskey

**OPPOSITION TO MOTION FOR LEAVE
TO FILE A BRIEF AMICUS CURIAE**

The Pennsylvania House of Representatives, Republican Caucus ("Caucus") has petitioned this Court for leave to file a brief of *amicus curiae* in support of Petitioners. Respondent hereby opposes that motion on the following grounds:

(1) The Caucus did not serve its Motion or Brief on Respondent's Counsel of Record, Donald Specter, as required by the Rules of this Court. Nor did the Caucus seek Respondent's consent (Mot. at i), or notify Respondent that it sought to file such a brief. Apparently the Caucus sent its Motion and Brief to Respondent's counsel in the court below, who forwarded it to Respondent's Counsel of Record. Respondent's Counsel of Record did not receive the Motion or Brief until March 12, 1998—over a week late.

(2) The Caucus' Brief raises broad constitutional issues that were not raised in the Court below, nor by Petitioners before this Court. Indeed, *Petitioner* (on whose behalf the *amicus* is purportedly filed) "declined to concur in the filing of [the Caucus's] brief because the Caucus argues a broader constitutional principle than the Department now wishes to espouse." Mot. at i.

(3) Respondent's Brief is due in approximately two weeks, on March 30, 1998. Respondent does not have sufficient time to research and respond to the Caucus' broad constitutional arguments in that short time period.

For the foregoing reasons, Respondent respectfully requests that the Caucus' Motion For Leave To File A Brief Amicus Curiae be denied.

DATED: March 12, 1998.

Respectfully,

DONALD SPECTER
Counsel of Record
PRISON LAW OFFICE

I, Geraldine Francisco-Ferrer declare:

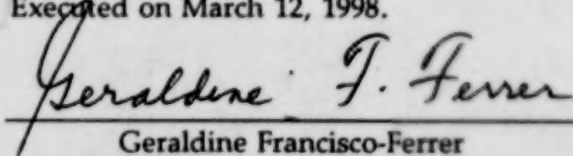
I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, Three Embarcadero Center, 7th Floor, San Francisco, California 94111.

On March 12, 1998, I served three copies of Opposition to Motion for Leave to File a Brief Amicus Curiae on all parties required to be served, as listed below, by depositing the documents with the United States Postal Service, first-class postage fully prepaid, addressed as follows:

Paul A. Tufano
General Counsel
Commonwealth of Pennsylvania
Sydni L. Guido
Deputy General Counsel
Alison Taylor
Suzanne N. Hueston
Assistant General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Counsel for Petitioners

John P. Krill
David R. Fine
Kirkpatrick & Lockhart LLP
240 North Third Street
Harrisburg, Pennsylvania 17101
Counsel for Amicus Curiae,
The Pennsylvania House of
Representatives Republican Caucus

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 12, 1998.


Geraldine Francisco-Ferrer

(12)

Supreme Court, U. S.

FILED

MAR 30 1998

No. 97-634

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
PETITIONERS

v.

RONALD R. YESKEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

SETH P. WAXMAN
*Solicitor General
Counsel of Record*

BILL LANN LEE
*Acting Assistant Attorney
General*

BARBARA D. UNDERWOOD
Deputy Solicitor General

PAUL R.Q. WOLFSON
*Assistant to the Solicitor
General*

JESSICA DUNSAY SILVER

LINDA F. THOME

SETH M. GALANTER

Attorneys

*Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

37 PP

QUESTION PRESENTED

Whether the exclusion of a state prisoner from a program of a state prison agency on the basis of disability may constitute a violation of the anti-discrimination provision of Title II of the Americans with Disabilities Act, 42 U.S.C. 12132.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-634

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
PETITIONERS

v.

RONALD R. YESKEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

The Department of Justice has responsibility for the enforcement and implementation of Title II of the Americans with Disabilities Act (ADA). 42 U.S.C. 12133, 12134. Because petitioners contend that Title II does not apply to a State's treatment of its prisoners, and that such an application would be unconstitutional, this case may affect the Department of Justice's ability to enforce Title II in the context of state prisons.

STATEMENT

1. Congress enacted the Americans with Disabilities Act (ADA) in 1990 as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). An exercise of the "sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," *ibid.*, the ADA broadly covers, and prohibits discrimination in, both private and public activity,

including employment (42 U.S.C. 12111-12117), public accommodations (42 U.S.C. 12181-12189), public transportation (42 U.S.C. 12141-12150) and, as relevant here, the full range of activities conducted by public entities (42 U.S.C. 12131-12134). Federal agencies are given a leading role in implementing and enforcing the ADA, in light of Congress's declared purposes to "provide clear, strong, consistent, enforceable standards addressing discrimination" against the disabled and to "ensure that the Federal Government plays a central role in enforcing" those standards on behalf of the disabled. 42 U.S.C. 12101(b)(2) and (3).

This case involves the anti-discrimination provision of Part A of Title II of the ADA, 42 U.S.C. 12132, which prohibits discrimination on the basis of disability by public entities. Section 12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Title II defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of public entities that receive federal financial assistance. Title II provides that "[t]he remedies, procedures, and rights" for actions brought under Section 504 shall be available to any person alleging discrimination in violation of Title II. 42 U.S.C. 12133; see also 42 U.S.C. 12201(a) (ADA must not be construed more narrowly than Rehabilitation Act). The ADA directs the Attorney General to promulgate regulations to implement Title II, and requires those regulations

to be consistent with pre-existing federal regulations that coordinated federal agencies' application of Section 504 to recipients of federal financial assistance, and interpreted certain aspects of Section 504 as applied to the federal government itself. 42 U.S.C. 12134(a) and (b). Title II thus extended Section 504's pre-existing prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance or conducted by the federal government itself to all operations of state and local governments, whether or not they receive federal assistance.¹

2. The Department of Justice has promulgated regulations for the implementation of Title II. 28 C.F.R. Pt. 35. Consistent with the legislative finding that discrimination against the disabled "persists in such critical areas as * * * institutionalization," 42 U.S.C. 12101(a)(3), those regulations provide for the application of Title II's anti-discrimination rule to state prisons. The regulations first state that the statute's coverage extends to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. 35.102(a). The preamble to the regulations indicates that this language was intended to apply to "[a]ll governmental activities of public entities," i.e., "anything a public entity does." 28 C.F.R. Pt. 35, App. A, at 466. Section 35.190(b)(6) designates the Department of Justice as the agency responsible for coordinating the compliance activities of public entities that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administra-

¹ See S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) (Senate Report) ("The first purpose [of Title II] is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance."); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 84, 151 (1990) (House Report) (similar); *id.*, Pt. 3, at 50 (similar).

tion of justice, including courts and correctional institutions." And the preamble's discussion of Section 35.130, which sets forth the general substantive prohibitions against discrimination, notes that a public entity may be required to provide assistance to individuals with disabilities "where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. Pt. 35, App. A, at 478. The Department's Title II Technical Assistance Manual, published in accordance with Section 12206 of the ADA, specifically lists "[j]ails and prisons" as types of facilities that, if constructed or altered after the effective date of the ADA, must be designed and constructed so that they are accessible to and usable by individuals with disabilities. Title II Technical Assistance Manual at II-6.0000, II-6.3300(6).²

3. Respondent was committed by a Pennsylvania court to petitioners' custody for a term of 18-36 months. (Respondent has sued various individuals as well as the Department of Corrections, but for simplicity, we refer in

² By statute, the Department of Justice's regulations must include standards for facilities consistent with minimum guidelines established by the federal government's Architectural and Transportation Barriers Compliance Board (Access Board), which was established by the Rehabilitation Act. 42 U.S.C. 12134(c); see 42 U.S.C. 12204(a); 29 U.S.C. 792. The Department's regulations provide that public entities building new facilities or altering existing ones may follow either the Uniform Federal Accessibility Standards (UFAS) or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), established by the Access Board. 28 C.F.R. 35.151(c); see 41 C.F.R. 101-19.6, App. A; 28 C.F.R. Pt. 36, App. A. The UFAS lists jails, prisons, reformatories and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. 101-19.6, App. A, at 154. Recent amendments to the ADAAG include specific accessibility guidelines for detention and correctional facilities. 63 Fed. Reg. 2000, 2009-2013 (1998). The Access Board adopted those amendments as a final rule in 1998. *Id.* at 2000. As adopted by the Access Board, they provide guidance to the Department of Justice in establishing accessibility standards under Title II. See *ibid.*; 42 U.S.C. 12134(c); 12204(a). The Department of Justice has proposed adoption of the amendments. 59 Fed. Reg. 31,808 (1994).

this brief to the Department as "petitioners.") The sentencing court recommended that respondent be placed in petitioners' Motivational Boot Camp program for first-time offenders; respondent's successful completion of that program would have led to his release on parole in six months. Petitioners determined, however, that respondent was ineligible for the Boot Camp program because of a medical history of hypertension. J.A. 6-7.

While still in custody, respondent brought this action, alleging that petitioners had violated the ADA's anti-discrimination mandate by refusing to allow him to participate in the Boot Camp program based upon his disability. J.A. 7-8. The district court dismissed the complaint for failure to state a claim based on petitioners' "threshold argument that the ADA does not apply to state prisons." J.A. 98.

The court of appeals reversed. J.A. 122-134. Following Congress's "direct[ion] that Title II of the ADA be interpreted in a manner consistent with Section 504," the court concluded that the language of both statutes "clearly encompasses" prisons, J.A. 124. That conclusion, the court stated, was "bolstered" by the Department of Justice's regulations applying both statutes to prisons and other correctional facilities, which regulations must be accorded "controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute." J.A. 126 (internal quotation marks omitted). The court rejected contrary decisions suggesting that Congress was required to refer specifically to state prisons in order to make the ADA applicable in that context: "[i]n light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms 'any' and 'all.'" J.A. 130. Finally, the court rejected petitioners' contention that prisoners cannot be "qualified individual[s] with a disability" under Title II because they are incarcerated involuntarily; that phrasing, it held, does not

"imply voluntariness or mandate that an individual seek out or request a service to be covered"; rather, it "describes those who are fitted or qualified to be chosen, without regard to their own wishes." J.A. 131 (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The anti-discrimination provision of Title II of the Americans with Disabilities Act (ADA), covering public entities, 42 U.S.C. 12132, applies to state prisons. The plain language of the ADA compels that conclusion; Title II prohibits discrimination on the basis of disability by any "public entity," which is defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." That language is clearly calculated to be all-encompassing. Moreover, other provisions of Title II, prohibiting exclusion on the basis of disability from the "benefits" of any "services, programs, or activities" furnished by a public entity, and limiting protections to "qualified individuals with a disability," cannot be reasonably read to exclude prisoners as a categorical matter from the scope of the ADA.

The clear-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), does not suggest that prisoners are not covered by Title II. That decision construed a statute that was ambiguous as to its coverage of the state judiciary to exclude such coverage, in the absence of a clear intent by Congress to include such a fundamental aspect of the state's governmental structure within the federal regulatory scheme. *Gregory* is inapplicable here because the ADA unambiguously covers every state entity, necessarily including prisons. *Gregory* does not require Congress to list every possible application of a federal statute to state governmental functions, nor does it permit a court to write exceptions to unambiguous legislation.

Coverage of state prisons is consistent with Congress's intent that Title II read at least as broadly as Section 504

of the Rehabilitation Act of 1973, which prohibits disability-based discrimination by recipients of federal financial assistance and in federally conducted activities. When Congress enacted the ADA, it was presumptively aware of administrative and judicial applications of Section 504 to state prisons. Title II should therefore be read to cover state prisons as well.

Application of Title II to state prisons is also supported by the Department of Justice's implementing regulations, which were authorized by Congress. Those regulations recognize the statute's application to state prisons and designate the Department of Justice as the federal agency responsible for monitoring state prison agencies' compliance with Title II. Even if Title II were ambiguous as to the coverage of state prisons, the Department's regulations would be controlling on the question, for they are at a minimum consistent with the statute, and so are entitled to deference.

There is no support for petitioners' contention that application of Title II to state prisons is inconsistent with the statute's purpose of integrating persons with disabilities into the mainstream of American society. Indeed, the particular program to which respondent sought access had the precise purpose of facilitating prisoners' reentry into mainstream society. And petitioners' arguments about the burdens of compliance with the ADA go to the wisdom of the legislation, not its applicability, and are in any event overstated.

Finally, application of Title II to programs provided by state prisons for their prisoners raises no serious constitutional questions. Petitioners object only to Title II's application to such programs; they do not dispute its application to state entities *generally*, or even to state prisons in their treatment of employees and visitors, as a valid exercise of Congress's power to enforce the Equal Protection Clause of the Fourteenth Amendment, by deterring and remedying discrimination against persons with disabilities by state and local actors. There was

ample basis for Congress to conclude that such discrimination is a serious and pervasive problem throughout society, infecting governmental decisionmaking, and that deterrence and remedies against such discrimination were necessary. Title II is a proportionate and flexible response to that problem of discrimination, for it requires only reasonable modifications of public programs to accommodate the disabled and does not require a State to assume undue expenditures or burdens. And, unlike the situation in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), there is no reason to believe that Congress enacted Title II out of displeasure with, or to overturn, this Court's constitutional holdings concerning discrimination against persons with disabilities. Congress's power to enforce the Equal Protection Clause is sufficient to deter and remedy discrimination against disabled persons inside prison as well as outside. Prisoners may claim the benefit of the Equal Protection Clause, for they do not lose all constitutional rights as a result of their incarceration. Moreover, Congress identified a need to deter and remedy irrational discrimination against the disabled in prison.

ARGUMENT

THE ANTI-DISCRIMINATION PROVISION OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT APPLIES TO STATE PRISONS

A. The Plain Language Of Title II Applies To State Entities That Operate Prisons

The starting point in the question of statutory construction before the Court is, as always, the language of the statute. *United States v. Gonzales*, 117 S. Ct. 1032, 1034 (1997). In this case, the statutory text is dispositive of the question, for it unambiguously provides that Title II applies to state prisons. Title II provides that no person shall be subject to discrimination on the basis of disability by a "public entity." 42 U.S.C. 12132. The statute defines the term "public entity" to include "any State or local government" and "any department, agency, special purpose

district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131. It is difficult to conceive of a more comprehensive definition of the public entities to which Title II applies. Title II plainly uses the word "any" in its ordinary "expansive" sense, *i.e.*, "one or some indiscriminately of whatever kind." *Gonzales*, 117 S. Ct. at 1035 (construing "any term of imprisonment" to mean "all 'term[s] of imprisonment,'" where the statute did not contain any language limiting the breadth of the word "any").

In the face of this all-inclusive statutory definition, petitioners suggest a number of limitations to the scope of Title II, all of which are without foundation in the text. First, petitioners suggest (Br. 12) that the statute is ambiguous because it does not specifically mention prisons in the definition of "public entity," or elsewhere in Title II or the ADA. No specific mention of prisons was necessary in light of the all-encompassing nature of the definition itself. Having said that the statute should apply to "any State" or "any department, agency, special purpose district, or other instrumentality of a State," Congress was entitled to expect that it would be applied to all such entities without exception.

Second, petitioners suggest (Br. 20) that Section 12132 does not apply to prisons because (they contend) it prohibits only discriminatory denial of the "benefits" of "services, programs, or activities," 42 U.S.C. 12132, which should not be construed to include correctional functions. That contention is incorrect for several reasons. First, the premise of the argument is wrong, for the anti-discrimination principle of Title II is not limited to the discriminatory exclusion of individuals from, or denial of the benefits of, "services, programs, or activities." Title II also provides that no qualified person with a disability shall "be subjected to discrimination by any such [public] entity." 42 U.S.C. 12132. Thus, whether or not prisons provide "services, programs, or activities," they are prohibited from discriminating on the basis of disability by

the concluding clause of Section 12132, a "catch-all phrase that prohibits all discrimination by a public entity." *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997). Cf. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520-521 (1982) (Title IX of Education Amendments of 1972).

Furthermore, even if Title II prohibited only discrimination in "services, programs, and activities," petitioners' argument would still fail, for those terms are easily read to include correctional functions such as eligibility determinations for a special correctional program like Pennsylvania's Boot Camp program. "Program" means "a plan of procedure: a schedule or system under which action may be taken toward a desired goal." *Webster's Third New International Dictionary* 1812 (1986). "Activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of "an organizational unit for performing a specific function." *Id.* at 22. Certainly, the boot camp program at issue here is a part of petitioners' execution of a "system" designed to accomplish a "desired goal," and operating that program falls within petitioners' "duties or functions." Indeed, Pennsylvania's Motivational Boot Camp Act defines the term "motivational boot camp" as a "program" and uses the word "program" repeatedly throughout the statute.³

Nor could prisoners be categorically excluded from the protection of Title II on the theory that incarceration is not the "benefit" of a service, program, or activity.

³ The statute defines "Motivational boot camp" as "[a] program in which eligible inmates participate for a period of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, ventilation therapy, continuing education, vocational training and prerelease counseling." Pa. Stat. Ann. tit. 61, § 1123 (West Supp. 1997); see also *id.* § 1124(b) (referring to a defendant's eligibility for "a motivational boot camp program"); *id.* § 1125 (entitled "[e]stablishment of motivational boot camp program"); *id.* §§ 1126, 1127.

Whether or not incarceration itself is a "benefit," incarcerated prisoners are granted or denied many benefits by their custodians. In this case, for example, respondent's successful completion of boot camp would have led to his early release from prison, a "benefit" by any common understanding of the term. Similarly, programs such as work-release, education programs, and parole provide "benefits" to prisoners. And in any event, Section 12132 prohibits the discriminatory "exclu[sion]" of persons with disabilities "from participation in" services, programs, and activities, as well as the discriminatory denial of their "benefits." There is no need, therefore, to decide whether prison programs provide "benefits," for it is sufficient that respondent has alleged that he was denied the opportunity to "participate in" the motivational boot camp program. J.A. 7.

Third, petitioners erroneously suggest (Br. 20) that a prisoner can never be a "qualified individual with a disability." Section 12131(2) defines that phrase to mean "an individual with a disability who * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Nothing in that definition excludes prisoners *per se*. Drawn from the Department of Justice's Rehabilitation Act regulations, the definition simply makes clear that public entities need not discard the essential eligibility requirements of their programs or activities in order to comply with the ADA. H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, at 38 (1990) (House Report); see 28 C.F.R. 41.32; *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

Petitioners argue (Br. 20) that the terms "eligible" and "participate" in the statutory definition of "qualified individual with a disability" connote voluntariness on the part of an applicant who seeks a benefit from the State and therefore exclude prisoners, who are incarcerated against their will. That reading of the statute, however, could also exclude schoolchildren and jurors, among others, from the

ADA's protections; it is also inconsistent with Congress's specific determination that the ADA was necessary because discrimination against persons with disabilities persists in "institutionalization." 42 U.S.C. 12101(a)(3). And even if prisoners are sentenced and incarcerated against their will, their participation in many correctional programs, such as work-release and education programs, may well be voluntary; respondent, for example, voluntarily sought to participate in the boot camp program. Moreover, the statutory terms are not so restrictive as petitioners suggest. "Eligible" describes those who are "fitted or qualified to be chosen," *Webster's Third New International Dictionary* 736 (1986), while "participate" simply means "to take part in something," *id.* at 1646. Not surprisingly, therefore, the statutory authorization for the boot camp program at issue here defines, at length, the qualifications of an "[e]ligible inmate" who may be selected for "participat[ion]" in the boot camp program.⁴

B. The "Clear Statement" Rule Of *Gregory v. Ashcroft* Has No Application To This Case

Relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), petitioners argue (Br. 11-22) that Title II should not be interpreted to apply to state prisons because Congress did not state *in haec verba* that the statute applies to prisons. That argument misapprehends the role of the "clear statement" rule articulated in *Gregory*, which is "a rule of statutory construction to be applied where statutory intent is ambiguous." 501 U.S. at 470. In *Gregory*, the Court examined an ambiguous exception to the Age Discrimination in Employment Act of 1967 (ADEA), which

⁴ The term "eligible inmate" appears throughout the Motivational Boot Camp Act, as do references to inmate "participants." See, e.g., Pa. Stat. Ann. tit. 61, § 1123 (West Supp. 1997) (defining "[e]ligible inmate" for "participation in the motivational boot camp program"); *id.* § 1124 (entitled "[s]election of inmate participants"); *id.* § 1126(a) ("eligible inmate may make an application" to "participate in the motivational boot camp program").

expressly applies to States as employers, see 29 U.S.C. 630(b)(2), but also excludes from its protections "any person elected to public office in any State * * * or an appointee on the policymaking level," 29 U.S.C. 630(f). The issue in *Gregory* was whether that exception applied to state judges who were appointed to office by the Governor and subject to retention election. 501 U.S. at 465. The Court concluded that the ADEA was "at least ambiguous" as to whether the judges were included within the exception. *Id.* at 467. Determining that it should "not attribute to Congress an intent to intrude on state governmental functions" such as the state judiciary without an unambiguous expression of that congressional intention, *id.* at 470, the Court declined to read the ADEA to cover state judges "unless Congress made it clear that judges are included." *Id.* at 467.

Gregory involved the construction of an ambiguous statute; it did not create a directive to write exceptions into unambiguous acts. See *Salinas v. United States*, 118 S. Ct. 469, 475 (1997). Unlike the situation in *Gregory*, there is no ambiguous exception in Title II to be construed, for Congress straightforwardly made all operations of public entities subject to the ADA. Moreover, *Gregory* does not require that Congress spell out each governmental operation that is made subject to federal legislation. Such a rule would be unworkable in practice, and would make pointless Congress's effort to ensure broad coverage of statutes like the ADA by employing all-encompassing statutory definitions of the public entities covered by the Act. Indeed, the Court stated in *Gregory* that the "clear statement" rule "does not mean that the Act must mention judges explicitly[;] * * * [r]ather, it must be plain to anyone reading the Act that it covers judges." 501 U.S. at 467. That requirement is fully satisfied by the ADA, which is expressly applicable to all public entities, defined in turn to include every agency of state or local government.

C. Congress Directed That Title II Be Applied As Broadly As The Rehabilitation Act Of 1973, Which Had Been Consistently Applied To State Prisons Before The ADA's Enactment

Congress repeatedly provided that the ADA be interpreted at least as broadly as Section 504 had been construed at the time of the ADA's enactment. Title II of the ADA states that rights and remedies under the two statutes are *in pari materia*, see 42 U.S.C. 12133, and requires that the Department of Justice's ADA regulations be consistent with the federal government's existing coordination regulations governing Section 504, see 42 U.S.C. 12134(b). Title IV also requires that nothing in the ADA be construed to apply a lesser standard than that applicable under Section 504 or its implementing regulations, see 42 U.S.C. 12201(a). In language closely similar to that of Title II, Section 504 provides that no otherwise qualified individual with a disability (before the ADA, a "handicap") shall on that basis "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" receiving federal financial assistance or conducted by the federal government. 29 U.S.C. 794(a). The legislative history of the ADA amply demonstrates that Congress intended at a minimum to extend the protections of Section 504 to all public entities, whether or not they received federal funds. See p. 3, *supra*.

At the time of the ADA's enactment, it was well established that Section 504 covered both state and federal prisons. The Department of Justice's regulations implementing Section 504 in the context of programs receiving financial assistance from the Department defined (and still define) "program" to mean "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections." 28 C.F.R. 42.540(h). Those regulations also defined "benefit" to include "provision of services, financial aid or disposi-

tion (*i.e.*, treatment, handling, decision, *sentencing*, *confinement*, or other prescription of conduct)." 28 C.F.R. 42.540(j) (emphasis added). The appendix to those regulations stated further that services and programs provided by federally assisted "jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities" are covered by Section 504, and that those facilities designated for use by persons with disabilities are "required to make structural modifications to accommodate detainees or prisoners in wheelchairs." 45 Fed. Reg. 37,620, 37,630 (1980).

The Department's Section 504 regulations for programs conducted by the Department itself similarly cover federal correctional facilities. See 28 C.F.R. 39.170(d)(1)(ii) (Section 504 complaint procedure for inmates of federal penal institutions); *id.* Pt. 39, Editorial Note, at 685 (Section 504 regulations requiring nondiscrimination in programs or activities of the Department of Justice apply to the Federal Bureau of Prisons), 686 (federally conducted program is "anything a Federal agency does"). Those regulations are particularly authoritative on the coverage of Section 504, for they were submitted to authorizing committees of the House and the Senate in 1984, pursuant to 29 U.S.C. 794(a), after Section 504 was amended to cover federally conducted programs. See 28 C.F.R. Pt. 39, Editorial Note, at 685; see also *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

The administrative construction of Section 504 was confirmed by pre-ADA judicial decisions recognizing that statute's application in the context of litigation brought by state prisoners. See *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988); *Journey v. Vitek*, 685 F.2d 239, 242 (8th Cir. 1982); *Sites v. McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W.Va. 1976). Given that weight of authority (and the absence of any contrary authority at the time of the ADA's enactment), Congress should be deemed to have

codified Section 504's application to state prisons when it enacted the ADA. "It is always appropriate to assume that our elected representatives * * * know the law," and in this case, because of the ADA's "repeated references" to Section 504, it is especially appropriate to conclude that Congress extended Title II to state prisons. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). A contrary ruling could not be squared with Congress's insistence that the courts and the Executive Branch apply the ADA at least as broadly as they had applied Section 504.

D. Administrative Implementation Of Title II Also Supports Its Application To State And Local Prisons

As we have explained above (pp. 3-4, *supra*), Congress delegated to the Department of Justice the authority to promulgate regulations implementing Title II and the responsibility to provide technical assistance to public entities covered by the ADA. 42 U.S.C. 12134(a), 12206. The Department has construed Title II to apply to state prisons, and petitioners do not contend otherwise. See p. 4, *supra*. In light of Congress's express delegation to the Department of Justice of the authority to make legislative-type rules implementing the ADA, the Department's construction of Title II must be accorded "controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight Sys. v. NLRB*, 510 U.S. 317, 324 (1994) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).⁵

⁵ Pursuant to its enforcement authority under both Title II and Section 504, the Department of Justice has entered into administrative settlement agreements with public entities that operate jails and prisons, to resolve complaints of discrimination on the basis of disability. We are lodging several examples of those settlement agreements with the Clerk and providing them to counsel for petitioners. Department of Justice records indicate that, during Fiscal Year 1997, the Department received 749 complaints of violations of Title II, of which 114 involved prisons.

Petitioners do not contend that the Department's interpretation of Title II to apply to state prisons is *contrary* to the statute. They argue, rather, that the statute is ambiguous as to its application to state prisons, and therefore it should be construed not to apply in that context, notwithstanding the definitive administrative interpretation, because that construction "would upset the usual [federal-state] constitutional balance." Pet. Br. 21-22. There is no support for petitioners' argument that an agency's otherwise permissible construction of a statute pursuant to an express delegation by Congress should be denied deference because it may affect the operation of some aspects of state governments. This Court has made clear, for example, that a federal agency acting within the scope of its congressionally delegated authority may preempt state law, even in the absence of any express congressional authorization for such preemption. See *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988). When an agency's preemption decision is challenged, the question for the courts is whether that decision represents a permissible implementation of the statute, not whether Congress itself has manifested any intent that state law be preempted. *Id.* at 64. That is so even though this Court will not conclude that Congress has preempted state law "unless that was [its] clear and manifest purpose." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). In a similar fashion, the Justice Department's permissible construction of Title II to apply to state prisons is controlling in this case.

Petitioners' argument that *Gregory v. Ashcroft*, *supra*, prevents the Court from deferring to that construction is without merit. The Court concluded in *Gregory* that an ambiguous provision of the ADEA should not be construed to apply to state judges in the absence of a clear statement from Congress to that effect. 501 U.S. at 467. The Court's decision did not address any question of deference, and

the Equal Employment Opportunity Commission (EEOC), which enforces the ADEA, did not request deference to its previous litigating position that the ADEA applied to state judges. The dissenting Justices in *Gregory* disagreed among themselves whether the EEOC's litigating position deserved deference, see *id.* at 485 n.3 (opinion of White, J.), 494 (Blackmun, J., dissenting). This case, however, does not involve only a litigating position on the part of the agency charged with implementation of a statute, but rather the Department of Justice's definitive construction of Title II pursuant to an express delegation to implement legislative rules. That construction is entitled to deference under standard principles of administrative law reflected in *Chevron*, and establishes that Title II applies to state prisons.

E: Petitioners' Policy-Based Arguments Are Unpersuasive

Petitioners advance a number of arguments intended to demonstrate that Congress would likely not have intended Title II to apply to state prisons. First, they suggest (Br. 5, 13-14) that the ADA generally is aimed at the integration of persons with disabilities into mainstream society, which purpose (they suggest) is not advanced by affording protection against discrimination to prisoners during their incarceration. There is no inconsistency, however, between a policy of ending societal segregation of the disabled and one of protecting disabled prisoners against discrimination. Even if prisoners are sentenced under a system that does not expressly recognize rehabilitation as a penological goal, Congress might well conclude that society has an interest in their obtaining access on a nondiscriminatory basis to whatever services, programs, and activities might be available to prepare them for life outside prison. Most prisoners must, at some point, return to the mainstream of American life. Congress could surely have intended that prisoners with disabilities not be punished *more* than other prisoners because of their

disability, and be *more* disadvantaged than other prisoners upon their return to society. This case presents an excellent example of such a situation, for the Boot Camp program is intended to strengthen first-time offenders' connection to mainstream society; there is no evident reason why offenders with disabilities, as a class, should be deemed unable to benefit from such a program.

Second, petitioners emphasize (Br. 14-15) the supposed onerousness of the ADA's nondiscrimination and accommodation requirements. It bears emphasis, however, that federal prisons and all state and local correctional institutions receiving federal assistance have long been subject to similar requirements under Section 504, and yet petitioners have pointed to no avalanche of litigation arising under Section 504 or disruption of legitimate correctional objectives resulting from its application to the States. There is no evident reason to believe that prisons' experience under the ADA will be more drastic. The ADA may require adjustments and flexibility in the administration of some prison programs—as Section 504 also requires—but the same might be said of the statute's application to school systems, public transportation systems, private employment, and public accommodations. Congress did not enact the ADA lightly, and petitioners' arguments based on burdensomeness are really a policy-based plea for an exemption, which should be made in a different forum.

F. Application Of Title II To State Prisons Does Not Raise Any Serious Constitutional Questions

Petitioners argue for the first time in this Court (Br. 22-32) that Title II should be read to exclude prisoners from coverage because Congress lacks the constitutional authority to prohibit discrimination against disabled state prisoners.⁶ As we have explained, there is no language in

⁶ Petitioners did not raise that contention in either court below, see J.A. 13-16 (motion to dismiss); J.A. 103-119 (appellate brief), nor was the argument addressed by the court of appeals. This Court has stated

Title II that can be "construed" to create a state-prison exception. And although this Court does construe ambiguous statutes to avoid serious constitutional questions, that practice does not warrant the rewriting of unambiguous legislation. See *Salinas*, 118 S. Ct. at 475; *Almendarez-Torres v. United States*, No. 96-6839 (Mar. 24, 1998), slip op. 13-14.

In any event, there are no serious constitutional questions raised by application of Title II in the state prison context. Quite significantly, petitioners do not challenge Congress's authority under the Fourteenth Amendment to apply the ADA to the States *generally*, or even to prisons vis-à-vis employees or visitors (see Pet. 11); they contend only that Title II cannot be applied to one particular state function, the prison system's treatment of its prisoners. As we explain below, the application of the ADA to public entities, including state prisons, is authorized by Section 5 of the Fourteenth Amendment.⁷

that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Although that rule might be broad enough to permit petitioners to argue in this Court that Title II should be construed to avoid an unconstitutional result, in our view it is not broad enough for them to argue that Title II is actually unconstitutional, should the Court agree with our submission that Title II unambiguously applies to state prisons. Petitioners did not argue in the lower courts that Title II is unconstitutional, nor does the question presented by the certiorari petition ("Does the Americans with Disabilities Act apply to inmates in state prisons," Pet. i) fairly include a constitutional question. Had the constitutionality of Title II been drawn in question in this case, the courts would have invited the United States to intervene as a party to defend the statute, pursuant to 28 U.S.C. 2403(a). Accordingly, any claim that Title II is unconstitutional is not properly before the Court. See *Yee v. City of Escondido*, 503 U.S. 519 (1992).

⁷ Because Congress's power under the Fourteenth Amendment is sufficient to sustain Title II, we do not address petitioners' Commerce Clause arguments in detail. To the extent, however, that petitioners rely on cases such as *Printz v. United States*, 117 S. Ct. 2365 (1997),

1. Section 5 of the Fourteenth Amendment is "a positive grant of legislative power to Congress." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997) (internal quotation marks omitted). Under Section 5, Congress may act to enforce the Equal Protection Clause of the Fourteenth Amendment in order to "deter[] or remed[y] constitutional violations * * * even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Ibid.* (internal quotation marks omitted). Although Congress does not have the authority to "decree the substance of the Fourteenth Amendment's restrictions on the States," it "must have wide latitude in determining" where to draw "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 2164.

"It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *City of Boerne*, 117 S. Ct. at 2172 (internal quotation marks and brackets omitted). Congress is, moreover, "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting Sys. v. FCC*, 117 S. Ct. 1174, 1189 (1997) (citations and internal quotation marks omitted). Accordingly,

and *New York v. United States*, 505 U.S. 144 (1992), that reliance is misplaced, for those cases are plainly inapposite. Title II does not require "the forced participation of the States' executive in the actual administration of a federal program." *Printz*, 117 S. Ct. at 2376. Rather, Title II simply forbids States from discriminating against the disabled in their provision of services, just as it prohibits private employers and places of public accommodation from engaging in such discrimination. See 42 U.S.C. 12112, 12182. Second, because Congress enacted Title II pursuant to its Fourteenth Amendment powers, the principles of federalism reflected in the Tenth Amendment and cases such as *Printz* have little relevance here. See *Milliken v. Bradley*, 433 U.S. 267, 290 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

legislation will be upheld as a valid exercise of Congress's Section 5 power if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. Title II readily satisfies that test.

2. Title II is a proportionate response to the problem of discrimination against persons with disabilities, which Congress reasonably found to be serious and pervasive. As an initial matter, there can be no serious dispute that irrational and invidious discrimination on the basis of disability violates the Equal Protection Clause. In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), this Court held unconstitutional the application of a zoning ordinance to deny a special use permit for the operation of a group home for mentally disabled persons. A majority of the Court recognized that "through ignorance and prejudice [persons with mental disabilities] have been subjected to a history of unfair and often grotesque mistreatment." *Id.* at 454 (Stevens, J., concurring) (internal quotation marks omitted); see *id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part). The Court also recognized that "irrational prejudice," *id.* at 450, "irrational fears," *id.* at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," *id.* at 465 (Marshall, J.), existed against persons with disabilities in society at large and at times infected government decisionmaking.

In enacting Title II, Congress reasonably concluded that "appropriate legislation" under Section 5 of the Fourteenth Amendment was necessary to remedy and deter unconstitutional discrimination against the disabled. First, the legislative record amply demonstrated pervasive, "society-wide discrimination" against the disabled based on fear and stigma that infects both public and private services. See S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989) (Senate Report); 42 U.S.C. 12101(a)(2)

(discrimination a "serious and pervasive" problem).⁸ After 14 congressional hearings, 63 field hearings, the submission of myriad reports by the Executive Branch and interested groups, and lengthy floor debates,⁹ Congress found that persons with disabilities have been subject to "a history of purposeful unequal treatment," 42 U.S.C. 12101(a)(7), and that this discrimination "persists" in many areas, including "public services," 42 U.S.C. 12101(a)(3). Congress also found that this discrimination includes "outright intentional exclusion, * * * overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, [and] segregation." 42 U.S.C. 12101(a)(5). As a result of that discrimination, Congress found, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).

These findings are "reasonable inferences based on substantial evidence." *Turner Broadcasting*, 117 S. Ct. at 1189 (internal quotation marks omitted). The evidence before Congress demonstrated that persons with disabili-

⁸ The committee reports accompanying the ADA demonstrate that Congress found considerable need to prevent discrimination against disabled persons by public entities, in particular. See Senate Report 7 (public schools), 12 (voting), 19, 44 (citing need to extend protection to state agencies that do not receive federal aid), 45 (school bus operations); House Report, Pt. 2, at 30 (zoos, public schools); 37, 84 (public services, generally); *id.* Pt. 3, at 50 (jails).

⁹ The principal hearings, reports, and studies that formed the basis for Congress's conclusion in the ADA that irrational discrimination against the disabled is a serious and pervasive problem are cited at *Coolbaugh v. Louisiana*, No. 96-30664, 1998 WL 84123, at *6, *12 n.4 (5th Cir. Feb. 27, 1998), and Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991). Congress also legislated against a background of 30 years' experience with other statutes enacted to protect the disabled against discrimination. See Lowell P. Weicker, *Historical Background of the Americans with Disabilities Act*, 64 Temp. L. Rev. 387, 387-389 (1991).

ties were excluded from public services and accommodations for no reason other than distaste for or fear of their disabilities. See Senate Report 7-8 (citing instances of discrimination based on negative reactions to sight of disability); House Report, Pt. 2, at 28-31 (same). The legislative record documented instances of exclusion of persons with disabilities from "a whole panoply of services because of simple prejudice." See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 408 (1991); *id.* at 412-414 (discussing widespread state-imposed segregation of persons with disabilities). After a thorough survey of the available data, the U.S. Commission on Civil Rights documented that prejudice against persons with disabilities manifested itself in many ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 23-26 (1983); see Senate Report 21. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7). In light of this evidence and these findings about pervasive discrimination against persons with disabilities, the broad applicability of the ADA, including its application to public entities in Title II, is proper.

Second, the statute's remedial provisions are a measured response to the evil identified. Unlike the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.* (RFRA), at issue in *City of Boerne, supra*, which required States to provide exemptions to their legitimate regulations for religious practices unless they could demonstrate that those regulations were the least restrictive alternative necessary to promote a compelling interest, the ADA requires only "reasonable modifications" that do

not entail a "fundamental[] alter[ation in] the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). Under the Department of Justice's implementing regulations, public entities generally need not provide accommodations if they can show "undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3). A similar rule of reason is found in the Department's Section 504 regulations, of which Congress is presumed to have been aware when it enacted the ADA. See 28 C.F.R. 39.150(a)(2), 41.53. Thus, while the ADA's nondiscrimination provision and reasonable-accommodation requirement do impose some burdens on the States, and while there is bound to be disagreement in some cases over the extent of the modification to a program that must be made to accommodate persons with disabilities, the statutory scheme acknowledges countervailing interests as well.

Furthermore, Congress concluded, based on the record before it, that a particularly serious form of discrimination facing the disabled was the use of blanket exclusionary rules based ultimately on unexamined stereotypes, fear, and prejudice.¹⁰ Even if some of those blanket rules, when applied by public entities, might survive rational-basis constitutional review, it was within Congress's power to conclude that, because those rules might actually be based on gross overgeneralizations and stereotypes about persons with disabilities rather than legitimate regulatory objectives, they should receive closer scrutiny under the statute. Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966) (although literacy tests might serve legitimate interests, "Congress might well have questioned * * * whether these were actually the interests being served" and therefore could constitutionally suspend them).

¹⁰ See 42 U.S.C. 12101(a)(5); Senate Report 7 (decrying discrimination "based on false presumptions, generalizations, [and] misperceptions"), 9 (similar); House Report, Pt. 2, at 30 (similar), 33 (discrimination from "use of standards and criteria" and "presumptions, stereotypes and myths"), 40 (similar); *id.* Pt. 3, at 25 (similar).

Finally, unlike the background to RFRA—which demonstrated that Congress acted out of displeasure with this Court’s decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), declaring the substance of the Free Exercise Clause—there is no evidence that Congress enacted the ADA because of its disagreement with any decision of this Court applying any particular constitutional standard to claims by persons with disabilities. And whereas the principal effect of RFRA was to establish a new rule of decision to be applied by the courts in constitutional litigation in place of the *Smith* rule, Title II takes a quite different approach, establishing an administrative enforcement mechanism to investigate claims of discrimination against the disabled, as well as authorizing a cause of action to redress discrimination.

Moreover, this Court has recognized that legislative remedies are particularly appropriate for persons with disabilities. In *City of Cleburne*, the Court declined to deem classifications based on disability as suspect or “quasi-suspect” in part because heightened constitutional scrutiny could unduly limit legislative solutions to problems faced by the disabled. 473 U.S. at 450. The Court reasoned that “[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task to legislators guided by qualified professionals.” *Id.* at 442–443. It pointed to legislation such as Section 504, intended to protect persons with disabilities, and expressed concern that requiring governmental entities to justify their efforts under heightened scrutiny might “lead [them] to refrain from acting at all.” *Id.* at 444. That concern demonstrates the propriety of Congress’s enactment of the ADA as a vigorous yet flexible response to the pervasive but complex problem of discrimination against persons with disabilities.

3. Petitioners contend (Br. 25–32) that Title II must be construed not to apply to state prisoners because, if it did so apply, then it would exceed Congress’s powers to

enforce the Fourteenth Amendment. There is nothing talismanic about state prison operations, however, that places them outside the legitimate scope of Congress’s Fourteenth Amendment power. Even though prisoners give up many of their civilian rights when they are incarcerated, see *Sandin v. Connor*, 515 U.S. 472, 485 (1995), and courts “accord deference to the appropriate prison authorities” in addressing prisoners’ claims of constitutional violations, *Turner v. Safley*, 482 U.S. 78, 85 (1987), the Court has made clear that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Id.* at 84; see *Sandin*, 515 U.S. at 485; *Wolff v. McDonnell*, 418 U.S. 539, 555–556 (1974). “It is settled that a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.” *Turner*, 482 U.S. at 95 (internal quotation marks omitted).

Prisoners with disabilities are therefore protected from irrational and invidious discrimination by the Equal Protection Clause, and Congress has the power under the Fourteenth Amendment to deter and remedy such discrimination. In our view, Congress’s conclusions about the need for deterrence and remedies against discrimination against disabled persons generally is sufficient to bring prisons within the legitimate scope of the ADA; but the legislative record demonstrates that Congress identified a problem of irrational discrimination against disabled persons specifically in the law enforcement system, such that deterrence and remedies in that context were thought necessary. See House Report, Pt. 3, at 50 (noting that persons with disabilities, including those with epilepsy, are “frequently inappropriately arrested and jailed” and “deprived of medications while in jail,” and stating that

"[s]uch discriminatory treatment based on disability can be avoided by proper training").¹¹

Moreover, nothing in the ADA is inconsistent with the need to consider an inmate's status as a prisoner, or the legitimate penological needs of the institution in which the inmate is incarcerated. Protections under Title II are limited to individuals who can meet the "essential eligibility requirements" of the relevant program or activity, with or without "reasonable modifications." 42 U.S.C. 12131(2). Nor would the ADA give inmates with disabilities the "right" to participate in programs such as the boot camp program at issue here. It would simply give inmates with disabilities the right not to be impermissibly excluded from such programs on the basis of their disability. Cf. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-284 (1977) (even though plaintiff could be fired for no reason at all, he may not be fired for an unconstitutional reason). Because of the posture of this case, the precise application of those concepts in the prison context is not before the Court, but whatever standard is to be applied to inmates' claims under Title II of the ADA, the court of appeals correctly held that it protects prisoners from discrimination on the basis of disability.

¹¹ See also *Accommodating the Spectrum of Individual Abilities*, *supra*, at 168 (describing "major types of areas of discrimination" against disabled in criminal justice system, including "inadequate ability to deal with physically handicapped accused persons and convicts (e.g. accessible jail cells and toilet facilities)"; *Americans With Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. 77 (1988) (testimony of Belinda Mason, describing incident in which arrestee with HIV was locked inside his car overnight); *Joint Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Select Educ. and Employment Opportunities of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. 63 (1989) (testimony of Justin Dart, describing experience of disabled persons arrested and held in jail).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

SETH P. WAXMAN
Solicitor General

BILL LANN LEE
*Acting Assistant Attorney
General*

BARBARA D. UNDERWOOD
Deputy Solicitor General

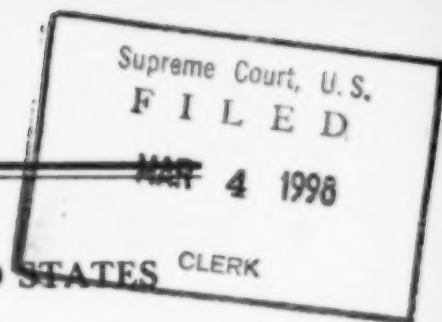
PAUL R.Q. WOLFSON
*Assistant to the Solicitor
General*

JESSICA DUNSAY SILVER
LINDA F. THOME
SETH M. GALANTER
Attorneys

MARCH 1998

No. 97-634

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997



COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS;
JOSEPH D. LEHMAN; JEFFREY A. BEARD, Ph.D.;
JEFFREY K. DITTY; DOES NUMBER 1
THROUGH 20 INCLUSIVE,

Petitioners,

v.

RONALD R. YESKEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE*,
THE REPUBLICAN CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES
IN SUPPORT OF PETITIONER

JOHN P. KRILL, JR.
(*Counsel of Record*)

DAVID R. FINE

KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, Pennsylvania 17101
(717) 231-4500

*Counsel for Amicus Curiae,
The Pennsylvania House of
Representatives Republican
Caucus.*

March 4, 1998

25 PR

**MOTION FOR LEAVE
TO FILE A BRIEF *AMICUS CURIAE***

The Pennsylvania House of Representatives, Republican Caucus (the "Caucus"), moves for leave to file the attached brief *amicus curiae* in support of Petitioners, the Pennsylvania Department of Corrections, *et al.*, (the "Department"). The Department declined to concur in the filing of this brief because the Caucus argues a broader constitutional principle than the Department now wishes to espouse. Since the Department declined to consent, the Caucus did not seek the consent of Respondent.

The Caucus has a particular interest in this case because of (1) its interest, from the perspective of state legislators, in the further delineation of the holding of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), and (2) a case now pending in the United States Court of Appeals for the Third Circuit in which it is a party and in which the constitutional issues raised in this case may be dispositive. *Young v. Pennsylvania House of Representatives, Republican Caucus*.

In this case, the Department argues that the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, cannot be construed to apply to state inmates and that prison management is a core state function such that federal law should be deferential to state determinations regarding inmates. In its petition for writ of certiorari, the Department also stated that "Congress's

enforcement power is not unlimited . . . It extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment and is 'remedial.' *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997)." See Petition for a Writ of Certiorari at 11. However, the Department has indicated to the Caucus that it may not explore in its brief the broader issue of the contours of this Court's holding last Term in *City of Boerne*. The Caucus believes that the broader constitutional question merits consideration by the Court at least through a brief *amicus curiae*.

The Caucus wishes to file a brief addressing the intersection of *City of Boerne* with the provision of the ADA that imposes mandates on state actors. If the Court were to accept the Caucus's argument, that determination would be dispositive of the case.

Respectfully submitted,

JOHN P. KRILL, JR.
(Counsel of Record)

DAVID R. FINE
Counsel for the Pennsylvania
House of Representatives
Republican Caucus

KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500

March 4, 1998

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INTEREST OF *AMICUS CURIAE*

The Pennsylvania House of Representatives, Republican Caucus ("the Caucus"), files this brief as *amicus curiae* in support of Petitioners because of (1) its interest, from the perspective of state legislators, in the further delineation of the holding of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), and (2) a case now pending in the United States Court of Appeals for the Third Circuit in which it is a party and in which the constitutional issues raised in this case may be dispositive.*

The Caucus is part of the Pennsylvania General Assembly, which is the legislative branch of the Commonwealth of Pennsylvania.

SUMMARY OF ARGUMENT

In its last two Terms, the Court has carefully refined its Eleventh-Amendment jurisprudence. In *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Court held that Congress could abrogate Eleventh-Amendment immunity only through Section 5 of the Fourteenth Amendment and that those enforcement powers are limited and cannot substantively modify the sweep of the Fourteenth Amendment. The *City of Boerne* Court

* No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amicus* made a monetary contribution to the preparation of this brief.

also held that congressional enactments must be narrowly tailored to address the particular harm to be remedied.

The Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, broadly regulates the states with regard to those with physical or mental disabilities. This Court has held that state actions or statutes challenged as discriminating against the disabled are due only a rational-basis review. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-46 (1985). When conducting a rational-basis review, a court is to presume that a state action will survive an Equal Protection analysis. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

This Court's jurisprudence regarding rational-basis review suggests a modest extension of the *City of Boerne* holding: classifications that are to be afforded a rational-basis review are inappropriate bases for broad congressional action under Section 5. Such a rule comports generally and logically with this Court's jurisprudence.

In a larger sense, such a modest extension of the *City of Boerne* holding would be wholly consistent with the principles so necessary to "Our Federalism." In a series of recent cases, the Court has carefully re-examined the relative roles of the federal and state governments. Such an examination is critical because it implicates broad democratic principles.

ARGUMENT

I. Congress did not have the power to extend the Americans With Disabilities Act to govern the activities of the states.

The Caucus will limit its argument to two issues: the effect of this Court's decision in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), on the pending case and the proper role of the federal legislature in light of "Our Federalism." *Younger v. Harris*, 401 U.S. 37 (1971).

In *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), this Court held that congressional mandates on the states must meet a two-part test: (1) Congress must issue a "clear legislative statement" that it intends to abrogate the states' sovereign immunity and (2) Congress must act pursuant to a "valid exercise of power." 116 S.Ct. at 1123.

In *Seminole Tribe*, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress could abrogate state sovereign immunity through the Interstate Commerce Clause, Art. I, § 8, cl. 3, of the Constitution. After *Seminole Tribe*, Section 5 of the Fourteenth Amendment provides the sole means for Congress to abrogate sovereign immunity. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 131 F.3d 353, 358 (3d Cir. 1997) ("In fact, the Court overruled *Union Gas* by determining that the Commerce

Clause itself did not provide a basis for Congress to abrogate the states' immunity under the Eleventh Amendment.").

When a federal statute addresses the conduct of state actors, the recurring question will therefore be whether Congress acted within the scope of its Fourteenth-Amendment power in enacting whatever statute is under review.¹ That analysis is guided by the Court's decision last Term in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), in which the Court examined the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.* The Court determined that RFRA was unconstitutional in that it exceeded Congress's power to enforce the provisions of the Fourteenth Amendment. 117 S.Ct. at 2172.

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the

¹ For purposes of this brief, the Caucus presumes that Congress intended to abrogate state immunity through the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (the "ADA"). In doing so, the Caucus does not concede that Congress expressed such intent and refers the Court to the brief of Petitioners.

States . . . Congress does not enforce a constitutional right by changing what the right is.

117 S.Ct. at 2164 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

In *City of Boerne*, the Court held that "[r]emedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'" 117 S.Ct. at 2170 (quoting *Civil Rights Cases*, 109 U.S. 3, 13 (1883)). The Court determined that RFRA was not so confined in that it swept so broadly that it affected every level of government both state and federal and all laws or regulations enacted by those governments. The Court concluded that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." 117 S.Ct. at 2171.

The Court compared the broad mandate of RFRA with the limited remedies provided in statutes found constitutional. For example, the provisions of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, *et seq.*, were limited to those regions of the country where voting discrimination had been most prevalent and the effect of those provisions lapsed seven years from their effective date. 117 S.Ct. at 2170. The Court explained

This is not to say, of course, that § 5 legislation requires termination dates,

geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

117 S.Ct. at 2170-71. The point, ultimately, is that a Section 5 enactment must be narrowly tailored to remedy the offense to the Fourteenth Amendment and must not proscribe an inordinate number of wholly constitutional state actions. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 117 S.Ct. at 2170. The scope of the "remedial" statute must be proportionate to the magnitude of the harm to be prevented. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne*, 117 S.Ct. at 2169 (citing *South Carolina v. Katzenbach*, 383 U.S. at 308)).

State statutes and actions regarding the disabled that are challenged under the Equal Protection provision of the Fourteenth Amendment are afforded only a rational-basis review rather

than any form of heightened scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-46 (1985). "Rational-basis" describes the minimal level of review given state action under the Equal Protection Clause. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The rational-basis inquiry is a deferential one and under it, courts must sustain state action unless the varying treatment of different groups or persons bears no rational relationship to any legitimate state purpose. *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Under the Court's precedents, most classifications made by a state will be afforded a rational-basis review. *Dukes*, 427 U.S. at 302-3. The effect of this standard on the ability of a legislature to make law cannot be overstated because almost all state (and federal) laws or actions classify people in one sense or another. *Clements v. Fashing*, 457 U.S. 957, 967 (1982) ("Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational will offend the Equal Protection Clause of the Constitution."). Accordingly, if the Court were to determine that Congress may exercise its Fourteenth-Amendment enforcement power in a situation where state

action affects a classification due a rational-basis review, what was intended to be merely an enforcement mechanism would instead become a portal through which Congress could regulate almost all state action or legislation.²

Consider, for example, the result in *Oregon v. Mitchell*, 400 U.S. 112 (1970). There, the Court held that Congress could not lower the minimum age of voters in state elections. Justice Black wrote "Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people." 400 U.S. at 127. Given the breadth of classifications afforded a rational-basis review, extending the Enforcement-Clause power to such classifications would, in fact, allow Congress to "prohibit every discrimination between groups of people." *Id.* Without the restraining principle set forth in *City of Boerne*, Congress could change the

² As the Court noted in *City of Boerne*, at the time Congress was debating the Fourteenth Amendment, Ohio Congressman John Bingham offered an amendment that would have dramatically increased the power of Congress. 117 S.Ct. at 2164. Congress opted for a much more limited version of the constitutional amendment that "did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property." 117 S.Ct. at 2165. Allowing Congress to legislate through the Fourteenth Amendment by heightening or suspending rational-basis scrutiny, would effectively set in place the rejected Bingham amendment.

outcome of practically every case in American history in which a distinction under state law was upheld under rational-basis scrutiny.

Another example may be similarly illustrative. Historically, the vast majority of criminal prohibitions have been matters of state law (e.g., murder, rape, assault, robbery). Of course, every criminal statute makes classifications, some among degrees of culpability, others among identities of victims. Were the Court to adopt a rule contrary to that urged by the Caucus, there would be no principled basis for preventing Congress from invading this traditional province of the states. For example, a future Congress might extend the "equal protection" of the Federal Sentencing Guidelines to the full range of state criminal law.

The overlay of the rational-basis analysis onto the teaching of *City of Boerne* suggests a modest refinement of the *City of Boerne* holding.³ Because a state action is ordinarily constitutional if it bears any rational relationship to a legitimate purpose, it is fair to presume most state statutes or actions would survive the analysis. Indeed, this Court has mandated such a presumption. *Dukes*, 427 U.S. at 303. In *City of Boerne*, the Court held that a congressional enactment that sweeps broadly may be appropriate so long as "many" of the state laws or actions it affects have a

³ The rule urged here by the Caucus echoes the holding of a 1996 decision of the Sixth Circuit in *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996).

"significant likelihood" of being unconstitutional. 117 S.Ct. at 2170. It is difficult to imagine how a broad congressional enactment that regulates state conduct with regard to classifications that receive a rational-basis review could meet the *City of Boerne* requirement of narrow tailoring, particularly given that those state actions are presumed constitutional under the precedent of this Court. *Dukes*, 427 U.S. at 303.

The suggested rule may be stated succinctly as follows: when a classification by a state warrants only a rational-basis review under the Equal Protection Clause, that classification is not a proper subject for a broad congressional mandate under the enforcement provision of the Fourteenth Amendment.⁴

The ADA provides a good example of the operation of the rule. While this Court has found that actions or statutes alleged to discriminate based on disability are to be afforded only a rational-basis review, Congress has effectively heightened, if not eliminated, the scrutiny.

⁴ In enacting RFRA, Congress specifically sought to overturn the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and "restore the compelling interest test as set forth in *Sherbert v. Verner*" 42 U.S.C. § 2000bb(b). In *City of Boerne*, the Court implicitly rejected the contention that Congress may proclaim the level of scrutiny with which purported constitutional violations are examined.

Consider, for example, two scenarios. In the first, a state employee brings an action in federal court under 42 U.S.C. § 1983 alleging a violation of his Equal Protection rights because of his hypertension.⁵ In the second, a state employee brings the same sort of challenge but under the ADA. In the first scenario, the defendant can argue that the state action had a rational basis. In the second, the defendant has available to him (or it) only the defenses available to any defendant under the ADA, none so deferential as the rational-basis review. For example, an ADA defendant may argue that a purportedly discriminatory job qualification is job-related and consistent with business necessity, but even if so, it must offer a reasonable accommodation. 29 C.F.R. § 1630.15(b)(1).

The effect of Congress's inclusion of the states as potential ADA defendants is to subject state action to a heightened review never demanded by this Court and to require affirmative accommodation by the states that is not in accord with the discretion this Court has allowed when considering the disabled as a class for Equal Protection purposes.⁶

⁵ Set aside, for purposes of this argument, issues of immunity and preemption.

⁶ The result would be different if the challenge were based on a racial classification. The Court has consistently held that racial distinctions are to be examined with strict scrutiny. *United States v. Virginia*, 116 S.Ct. 2264, 2275 n.6 (1996). Accordingly, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

City of Boerne, 117 S.Ct. at 2172 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

The *City of Boerne* holding applies with equal vigor in this case. In its Fourteenth-Amendment jurisprudence, the Court has recognized a minimal standard of review for classifications based on disability; in enacting the ADA and applying it to the states, Congress has

2000e, *et seq.*, is unlikely to be viewed as overinclusive and, therefore, to cross the proscribed line between legislation that is remedial and that which enlarges substantive rights.

enlarged rather than preserved existing rights and those "contrary expectations must be disappointed."

II. Fundamental Principles of Federalism Will Be Advanced by Resolving This Case in Favor of Petitioners.

Congress has fallen into the habit of behaving as though it has general police power over all persons, entities and pursuits. Congress seems to treat its enforcement power under the Fourteenth Amendment as a convenient complement to its power under the Commerce Clause, with the sum of the two being authority over all private and public activity in the United States. The statute at issue in this case, the ADA, regulates private activity under the Commerce Clause (the reach of which is not at issue in this case) and public activity purportedly under the Fourteenth Amendment. The continuing federalization of our law is a phenomenon of which the federal judiciary, in particular, may take notice, in part because of the impact on its dockets.

This Court's recent decisions in *City of Boerne* and in *Printz v. United States*, 117 S. Ct. 2365 (1997), *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and *United States v. Lopez*, 514 U.S. 549 (1995), signaled a return to principles of federalism that can restrain this tendency. These principles are essential for the furtherance of democratic values. Adherence to these principles, moreover, will strengthen the nation, while their abandonment will weaken it.

The states can and do respond to their citizens. Although the alleged unresponsiveness of the states is invoked as a non-constitutional justification for federal intervention in a field, it is often forgotten that, historically, the federal government suppressed humane social initiatives by the states. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). In a sense, the federal government did not stop suppressing such state initiatives until it was ready to dominate the field.

In the area of human rights, many states nevertheless are more liberal than the federal government. "State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Citizens of the Commonwealth of Pennsylvania, for example, enjoy constitutional rights that are not found in the Constitution of the United States. See, e.g., PA CONST., Art. I, § 27; (environmental rights) and Art. I, § 28 (equal rights on the basis of gender). Furthermore, as Justice Brennan later observed, "the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps" William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

Another common justification offered for federal intervention is that there is a need for uniformity. Uniformity, though, is not the goal of a federal system. The ability to have non-uniformity is a positive value which permits the continuous evolution of standards that balance the best, tested ideas with idiosyncratic local concerns.⁷ A corollary to the concept of the states as laboratories of democracy is the concept that they must be independent laboratories, not working under federal contract, in order to fulfill the function. They must have real sovereignty, i.e. the ability to err (or to do nothing) with impunity, in order to struggle toward the best solutions. The United States is a vast and diverse nation. In the long term, our federal structure needs to accommodate diversity in the same sense that any large structure should not be so rigid that it cannot withstand stresses.

Those who crave a general, national government are putting themselves in conflict with more than just the unbroken constitutional doctrine of limited, delegated federal powers. They are short-sightedly diminishing the ability of our system to flex to accommodate diverse priorities and needs. Each time that Congress mandates action by the states, it is substituting its own

⁷ The finest example of this process is the Uniform Commercial Code, the result of quiet, continuing dialogue among the states. The Caucus has, of course, great respect for Congress, but doubts that it could maintain such a stable body of law if it chose to federalize it.

determination of priorities for those of the individual states.

The proponents of a general, national government are also overlooking the implications of a basic doctrine accepted by every state — that every person has the fundamental right to equal representation and equal voting rights in state government. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The constitutional structure of the federal government makes it less representative than the structure of the states. All elected state and local officials must be chosen on a one-person-one-vote basis, but no federal official is. In the United States Senate, senators representing about seven percent of the U.S. population have 20 per cent of the seats. Even U.S. House districts vary significantly in population from state to state, with the largest being 75 per cent larger than the smallest. The 1990 Census data show that, under the electoral college system, the President could be elected in a two-way race by as little as 23 per cent of the national vote. The representational disparities have been increasing. In 1790 the biggest state was only about 12 times more populous than the smallest state. In 1990 our largest state was 65 times more populous than our smallest.

It is not too far-fetched to imagine what could happen if Congress, left unchecked by the Court, completes the transformation of the federal government into a general government. Functionally, the states could become mere

regional offices of the various federal departments, administering federal policy. Electorally, the states would still be the constitutionally-defined constituencies from which federal officials are elected. But our smaller states might eventually come to be regarded in the same way as the British rotten boroughs, which, by the early nineteenth century, were viewed as having intolerable overrepresentation in Parliament. Under the British constitution, Parliament was able to ameliorate the inequities of representation by passing the Reform Bills of 1832, 1867 and 1884. Our Constitution, however, would not allow such a remedy and, so, the judiciary must prevent federal usurpation of power that could lead to unmanageable tension.⁸

The constitutional compromise embodied in the federal electoral structure was accepted on the premise that the federal government would not supplant the states and become a general government. See *THE FEDERALIST* No. 39, at 245 (J. Madison). This premise was still important at the time of the adoption of the Fourteenth Amendment. See discussion *supra* note 2. The assumption of general police power by the United States violates the fundamental principle of equal representation

⁸ To obtain an equal population in each House district, the Constitution would have to be amended to allow House districts to cross state lines. To elect the President on a one-person-one-vote basis would require changing or abolishing the Electoral College. To provide one-person-one-vote representation in the Senate would require the consent of each state.

that should be the foundation of a general government. A disciplined federalism will keep us from reaching this point, while allowing Congress to exercise the great national powers that have been delegated to it.

CONCLUSION

For these reasons, the Caucus urges that this Court reverse the decision of the United States Court of Appeals for the Third Circuit.

JOHN P. KRILL, JR.

(Counsel of Record)

DAVID R. FINE

Counsel for the Pennsylvania

House of Representatives

Republican Caucus

KIRKPATRICK & LOCKHART LLP

240 NORTH THIRD STREET

HARRISBURG, PENNSYLVANIA 171010

(717) 231-4500

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN;
JEFFREY A. BEARD, PH.D.; JEFFREY K. DITTY;
DOES NUMBER 1 THROUGH 20 INCLUSIVE,
v. *Petitioners,*
RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION,
U.S. CONFERENCE OF MAYORS,
NATIONAL LEAGUE OF CITIES, AND
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

QUESTION PRESENTED

Whether the Americans With Disabilities Act applies to inmates in state prisons.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-634

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN;
JEFFREY A. BEARD, F.H.D.; JEFFREY K. DITTY;
DOES NUMBER 1 THROUGH 20 INCLUSIVE,
v. *Petitioners,*

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION,
U.S. CONFERENCE OF MAYORS,
NATIONAL LEAGUE OF CITIES, AND
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*¹

Amici are organizations whose members include state, county, and municipal governments and officials

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed

throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.

"Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Because corrections administrators are responsible for every aspect of inmates' lives, "the possibilities for litigation . . . are boundless." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Moreover, inmate populations have a substantially greater percentage of persons with ADA covered disabilities than the population at large. The court of appeals' holding that the ADA protects state prisoners makes prison management even more complex and difficult, subjecting administrators' decisionmaking to endless judicial second guessing and thereby "unnecessarily . . . perpetuat[ing] the involvement of the federal courts in affairs of prison administration." *Id.* at 407; see also *Lewis v. Casey*, 116 S.Ct. 2174, 2185 (1996).

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

with the Clerk of the Court. Pursuant to Rule 37.3 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Amici adopt petitioners' statement.

SUMMARY OF ARGUMENT

1. One of the States' core functions is protecting the lives, liberty and property of their citizens through the mechanisms of the criminal law. A principal means by which the States accomplish this responsibility is by committing to a term of imprisonment those "persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

The Court's cases interpreting both the contours of fundamental rights within prisons and the Eighth Amendment recognize that the practical necessities of prison administration require that prison officials be given broad deference. As the Court has explained, "the realities of running a penal institution are complex and difficult." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977).

2. Affirmance of the court of appeals' holding would make state prison administration substantially more complex and difficult than it already is. Various surveys indicate that prison populations have a much greater percentage of persons with such ADA covered disabilities as HIV infection and AIDS, learning disabilities, mental retardation, psychological disorders, drug addiction and alcoholism. In most state prison systems, inmates are classified and assigned to facilities based, in part, on their disabilities. Administrators engage in this practice to meet disabled inmates' needs in a cost-effective manner. Yet this practice apparently violates a Justice Department regulation (28 C.F.R. § 35.130(b)(2)), and has prompted several

ADA suits by inmates who assert that they must be mainstreamed into the general prison population.

Indeed, because prison administrators are responsible for every aspect of prisoners' lives, such fundamental decisions as allocating jobs in prison industries, spaces in educational and vocational training programs, recreational opportunities, and other institutional privileges are likely to prompt costly and fact-intensive ADA suits. If the ADA is held to apply, the decisions of prison administrators will be subject to endless judicial second-guessing, a result contrary to this Court's longstanding recognition that federal courts are not to become "the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration." *Turner v. Safley*, 482 U.S. 78, 89 (1987) (citation omitted).

3. The court of appeals' holding that the ADA's "public services" provisions apply to state prisons ignores this Court's longstanding recognition of the centrality of prison administration to the States' sovereign interests. Its holding cannot be affirmed given the numerous indications in the statute which demonstrate that Congress did not intend for the ADA to apply to state prisoners.

Prisons do not provide "public services." As the Fourth Circuit has noted, this language "connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded." *Amos v. Maryland Dept. of Pub. Safety & Corr. Servs.*, 126 F.3d 589, 596 (4th Cir. 1997) (citation omitted). Prisons simply do not provide "public services" in the same way that a state uni-

versity or park system does. Moreover, to "meet[] the essential eligibility requirements" for "participation in [prison] programs or activities," 42 U.S.C. § 12131(2), a person must be incarcerated, an act which removes them from the public at large.

The conclusion that Congress did not intend for the ADA to apply to state prisoners is buttressed by its findings. Most significantly, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Notably, Congress did not include such terms as "incarceration," "imprisonment," or "corrections" in this finding, a telling omission given that there were 700,000 prisoners in state custody at the time of the ADA's enactment, a population which greatly exceeded the number of patients institutionalized in state mental hospitals and residential facilities. Other findings demonstrate that Congress enacted the ADA to enable the disabled to engage in "independent living," and "to pursue those opportunities for which our free society is justifiably famous." *Id.* § 12101(a)(8) & (9). The absence of any findings manifesting Congress' intent to apply the ADA to state prisoners reinforces the conclusion that the court of appeals' holding should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE AMERICANS WITH DISABILITIES ACT APPLIES TO INMATES IN STATE PRISONS

The court of appeals erred in holding that respondent has a cause of action under the Americans With Disabilities Act (ADA) to challenge the decision of Pennsylvania's prison administrators which denied him entry into a motivational boot camp. Regardless of whether the operations of the States' corrections departments constitute a "program or activity" under the literal language of the statute, *see* 42 U.S.C. § 12132, this language cannot be deemed to manifest Congress' intent to apply the ADA's "Public Services" subchapter to state prison systems because there are other contrary indications in the statute.

As explained below, the management of prison systems is a core state function. This Court's cases interpreting both the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments" and the contours of fundamental rights in the prison setting establish that state prison administrators are entitled to broad deference in carrying out their duties. Thus, even if Congress has the power to subject state prison systems to the ADA, *see* Pet. App. 11a, the federal courts cannot presume that Congress did so given the numerous contrary indications in the statute. This Court should therefore reverse the judgment of the court of appeals.

A. State Prison Administration Is Entitled To Substantial Deference Under The Constitution

1. It is axiomatic that "[t]he Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *New York v. United States*, 505 U.S. 144, 155 (1992) (quoting U.S. Const. amend. X). As James Madison explained:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State.

The *Federalist* No. 45, at 296 (Isaac Kramnick ed. 1987). *See also* *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone.").

One of the ways in which the States accomplish this core function of securing "internal order" and protecting "the lives, liberties, and properties of the people," *Federalist* No. 45, at 296, is through defining and punishing criminal activity. As this Court has repeatedly observed, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotations and citations omitted). One of the principal means

by which the States enforce the criminal law is by committing to a term of imprisonment those "persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

In cases interpreting both the Eighth Amendment and the contours of fundamental rights within prisons, the Court has recognized that the practical necessities of prison administration require that the decisions of prison officials be given broad deference:

Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

Thus, the Court, while acknowledging that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," has held that a prison regulation which impinges on fundamental rights is nonetheless "valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 84, 89 (1987). The Court further explained that this

standard is necessary if "prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to

anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

Id. at 89 (quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977) (rejecting First Amendment challenge to prison regulations), and *Procunier*, 416 U.S. at 407). See also *Lewis v. Casey*, 116 S.Ct. 2174, 2185 (1996). And in *Thornburgh v. Abbott*, 490 U.S. 401, 415-19 (1989), the Court made clear that even when fundamental constitutional rights are implicated, prison officials are not required to "set up and shoot down every conceivable alternative method" of accommodating a right.

The Court has shown a like degree of deference in its cases which hold that the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments" applies not only to punishments imposed pursuant to a sentence but also "to some deprivations that were not specifically part of the sentence but were suffered during imprisonment." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

Thus, in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Court held that an Eighth Amendment violation "is manifested by prison doctors in their response to the prisoner's needs or by prison guards

in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-05 (footnotes omitted). The Court, however, further explained that "[t]his conclusion does not mean . . . that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." *Id.* at 105. Out of respect for the deference that corrections administrators require to manage their prisons, the Court thus held that the Eighth Amendment is not violated unless administrators act with "deliberate indifference to [the] serious medical needs of [their] prisoners." *Id.*

The Court has further explained that even where prison conditions are "harmful enough to satisfy the objective component of an Eighth Amendment claim, whether [an administrator's conduct] can be characterized as [stating a claim also] depends upon the constraints facing the official." *Wilson*, 501 U.S. at 303. This rule applies to all conditions of confinement claims because "as a general matter, the actions of prison officials with respect to these nonmedical conditions are [not] taken under materially different constraints than their actions with respect to medical conditions . . . [making] 'it . . . appropriate to apply the "deliberate indifference" standard articulated in *Estelle*.'" *Id.* at 303 (quoting *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987)).

Most recently the Court reiterated that the Eighth Amendment "incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (internal quotations & citations omitted). As the Court has recognized, this standard is nothing less than a manifesta-

tion of the balance struck by the text of the Eighth Amendment, which "does not outlaw cruel and unusual 'conditions,'" but rather "outlaws cruel and unusual 'punishments.'" *Id.* at 837.

That the Constitution provides state prison administrators with a zone of deference is simply an acknowledgment that "the realities of running a penal institution are complex and difficult." *Jones*, 433 U.S. at 126. As this Court has noted:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation . . . are boundless.

Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). See also *Turner*, 482 U.S. at 84-85 ("[r]unning a prison is an inordinately difficult undertaking").

2. Affirmance of the court of appeals' holding would make state prison administration substantially more "complex and difficult" than it already is. *Jones*, 433 U.S. at 126. As the Court noted in *Preiser*, prison administrators are responsible for every aspect of prisoners' lives. See 411 U.S. at 491-92. Such fundamental administrative decisions as allocating jobs in prison industries, spaces in educational and vocational training programs, recreational opportunities, and

other institutional privileges are likely to prompt an ADA suit. *See, e.g., Amos v. Maryland Dept. of Pub. Safety & Corr. Servs.*, 126 F.3d 589, 591 (4th Cir. 1997); *Love v. Westville Corr. Center*, 103 F.3d 558 (7th Cir. 1996). This is a consequence of no small moment given the highly litigious nature of prisoners, *see, e.g.,* Judicial Conference of the United States, *Long Range Plan For The Federal Courts* 63-65 & n.14 (1995),² and that prison populations are likely to have a much greater percentage of persons with an ADA covered disability than the population at large.³ *See, e.g.,* Malcolm L. Lachance-McCulloch & James M. Tesoriero, "AIDS," in *Encyclopedia of American Prisons* 14 (Marilyn D. McShane & Frank P. Williams III, eds., 1996) ("HIV infection rates in prisons ex-

² The Fifth Circuit has observed that "'pro se civil rights litigation has become a recreational activity for state prisoners,' and prisoners have abused the judicial system in a manner that non-prisoners simply have not." *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997) (quoting *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam)).

³ The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment." 42 U.S.C. § 12102(2). The Justice Department's regulations state that

[t]he phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism.

28 C.F.R. § 35.104.

ceeded the general population by as much as five or six to one"; National Institute of Justice/Center For Disease Control survey "reflected an AIDS incidence rate in prison that was twenty times higher than that of the 1992 U.S. general population").

As further example, a survey of all state and federal prison systems found that 10.7 percent of inmates have a learning disability, 4.2 percent suffer from mental retardation, 7.2 percent have psychotic disorders, and 12.0 percent have other psychological disorders. Louis and Carol Veneziano, "Disabled Inmates," in *Encyclopedia of American Prisons*, at 159. One study has "found that the prevalence of psychological disorders among prisoners in state, federal, and military prisons varied . . . from 7 to 10 percent," and another "found that 42 percent of the inmates tested had a learning deficiency, and that 82 percent of those with learning deficiencies were classified as learning disabled." *Id.* Numerous other inmates suffer from alcoholism and drug addiction. *See Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996); *see also* The National Center on Addiction and Substance Abuse, *Behind Bars: Substance Abuse and America's Prison Population* 2 (1998) (estimating that 80 percent of inmates have history of drug or alcohol abuse).

The application of the ADA to state prison systems would exacerbate the already "Herculean obstacles to [the] effective discharge" of prison administration. *Procunier*, 416 U.S. at 404. In most state prison systems, inmates are classified and assigned to a particular facility, in part, based on their disabilities. *See* Edith E. Flynn, "Diagnostic and Reception Centers," in *Encyclopedia of American Prisons*, at 152-54. Ad-

ministrators engage in this practice to meet disabled inmates' needs in a cost-effective manner. Yet if the ADA applied, this practice would apparently conflict with the Justice Department's regulation stating that "[a] public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2).

Indeed, classification decisions have already prompted ADA suits on the ground that they violate an inmate's right to be mainstreamed in the general prison population. *See, e.g., Amos*, 126 F.3d at 591 (claim by prisoners that their assignment to a particular institution because of their disabilities "depriv[ed] them of the opportunity to serve their sentences at available facilities closer to their homes" as well as "equal access to bathrooms, athletic facilities, the 'honor tier,' and food services"); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3398 (Oct. 20, 1997) (No. 97-686).

If the ADA applied, the decisions of corrections administrators allocating scarce resources such as placement in prison jobs or educational courses would be subject to endless judicial second-guessing, a result which is contrary to this Court's longstanding recognition that federal courts are not to become "the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" *Turner*, 482 U.S. at 89 (quoting *Procunier*, 416 U.S. at 407). And

ironically, the costs state prison systems incur in litigating ADA suits—which, in addition to their own legal costs, might include damages, attorney's fees, and costs of complying with injunctions—will result in administrators having even fewer funds with which to meet inmate needs. *See, e.g., Love*, 103 F.3d at 559 (affirming judgment awarding prisoner \$30,948 in damages and \$39,536.75 in attorneys' fees).

B. Congress Did Not Intend To Apply The ADA To State Prisoners

Ignoring this Court's longstanding recognition of the centrality of prison administration to the States' sovereign interests, the court of appeals held that the literal language of the ADA's "public services" provision manifests Congress' intent to apply the statute to state prisoners. To reach this result, the court of appeals engaged in a superficial reading of the statutory language, ignoring other telling indications in the statute itself which demonstrate the implausibility of its holding. *See Pet. App. 4a*. Most revealing is the lower court's extensive reliance on the Justice Department's regulations rather than on probative indicia of Congress' intent. This would, of course, be unnecessary if Congress' intent was clear. *See id.* at 5a-6a.

The Court, however, has never held that a federal agency's construction of ambiguous statutory language should be given effect when it would fundamentally alter the federal-state balance. Indeed, the Court has repeatedly required a clear statement by Congress to ensure that it "has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. at 461 (quoting *Will v. Michigan*

Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). As the Court has further noted, "[t]his plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

Adherence to this rule is of the utmost necessity given the enormous burdens that ADA application would have on state prison systems. As explained above, inmate populations have a much higher incidence of ADA covered disabilities than the population at large. See *supra* pp. 12-13. Moreover, in contrast to other ADA covered entities, prison administrators oversee every aspect of inmates' lives.⁴ See *Preiser*, 411 U.S. at 492. Applying the ADA to prisons would impose enormous burdens on the States and interject the federal courts into the most sensitive areas of penological policy. The court of appeals simply ignored these unreasonable consequences, which compel a more thorough analysis of the statutory language and its context, purposes and history. See, e.g., *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (declining to "attribute to Congress the intention to . . . open the

⁴ An employer, for example, may rightfully be required to provide a disabled employee with a reasonable accommodation so as to enable the employee to perform a job. As a general matter, however, an employer's ADA obligations will begin and end with the workday. The employer, for example, will not bear responsibility for removing architectural and transportation barriers unrelated to its workplace. In short, the employer's burden is limited; it does not encompass every aspect of a disabled employee's life.

door to . . . obvious incongruities and undesirable possibilities") (quoting *United States v. Dow*, 357 U.S. 17, 25 (1958)).

The notion that Congress intended by §§ 12131 and 12132 to apply the ADA to state prisons and their inmates is belied by the caption Congress gave the relevant provisions. Subchapter II is entitled "Public Services." See 42 U.S.C. § 12131. As the Fourth Circuit has noted, this caption "'connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded.'" *Amos*, 126 F.3d at 596 (quoting *Torcasio v. Murray*, 57 F.3d 1340, 1346 (4th Cir. 1995)). To suggest that a prisoner, who has been committed to the custody of a State's corrections department for a term of imprisonment, is receiving "public services" is to ignore that members of the public at large cannot, and do not desire to, receive these "services." Prisons simply do not provide "public services" as a state university or park system does.

For similar reasons it is implausible to suggest that Congress intended that the term "qualified individual with a disability" would embrace state prisoners. 42 U.S.C. § 12131(2). As Congress defined the term, a person is not deemed to be a "qualified individual" unless he "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* Even if jobs in prison industries or places in a prison course of instruction constitute a program or activity, here, too, members of the public ordinarily do not "meet[] the essential eligibility requirements" for "participation in [prison] programs or activities," i.e., incarceration in prison upon conviction of a criminal offense. Indeed, it is odd to think of punishment

by incarceration for commission of a crime as an "essential eligibility requirement[]," *id.*, for one's "access to public services." *Id.* § 12101(a)(3).

That Congress did not intend for the ADA's "public services" provisions to apply to state prisoners is buttressed by the findings it made. These findings clearly demonstrate that Congress intended that the ADA would principally apply to disabled individuals living in free society and not prisons. *See generally* 42 U.S.C. § 12101(a). Most significantly, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). Notably, Congress did not include such terms as "incarceration," "imprisonment," or "corrections" in this finding. This a telling omission given that at the time of the ADA's enactment there were approximately 700,000 prisoners in state custody, *see* U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 610 (1993), a population which greatly exceeded the number of patients then institutionalized in state mental hospitals and residential facilities for the mentally ill.⁶ *See* U.S. Department of Commerce, *Statistical Abstract of the*

⁶ In its ordinary meaning, the term institutionalization connotes the act of "plac[ing] (a person) in the care of an institution," which is [a] place for the care of persons who are destitute, disabled, or mentally ill." *The American Heritage Dictionary Of The English Language* 936 (3d ed. 1992). *See also Webster's Third New International Dictionary* 1172 (1986) (defining institutionalization as "the action or a result of institutionalizing <the [institutionalization] of the insane>").

United States 1997 137 (1997) (Tables Nos. 204 & 205).

Congress also found that

the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and . . . the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous[.]

42 U.S.C. § 12101(a)(8) & (9). Prisoners, of course, do not engage in "independent living." *Id.* Nor are they entitled to "full[y] participat[e]" in, or "to pursue those opportunities for which our free society is justifiably famous." *Id.*

As the tenor of these and Congress' other findings demonstrate, Congress enacted the ADA to address discrimination against the disabled in "our free society." *Id.* None of the nine comprehensive findings which Congress made manifests an intent to provide state inmates with the protections of the ADA.⁶ The

⁶ Congress also stated that its purpose was "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). While prison populations contain large numbers of disabled inmates, the policies and rules of state prison administrators cannot be reasonably understood as being a "major area[] of discrimination faced day-to-day by people with disabilities." *Id.* Only a small fraction of the estimated forty three million disabled Americans are ever imprisoned; prison administrators' policies and rules are simply not a "major area[] of discrimination faced day-to-day" by the disabled.

absence of any reference to "corrections" or "incarceration" in its numerous findings demonstrates that Congress would have viewed a judicial interpretation that the statute protects state prisoners as an unintended and unduly disruptive result.

The legislative history supports this conclusion. As one of the House Reports notes, the ADA "will permit the United States to take a long-delayed but very necessary step to welcome individuals fully into the mainstream of American society." H. Rep. No. 485(I), 101st Cong., 2d Sess. 24 (1990), reprinted at 1990 U.S.C.C.A.N. 268. See also H. Rep. No. 485(II), 101st Cong., 2d Sess. 50, reprinted at 1990 U.S.C.C.A.N. 332 ("there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life"). As these statements make clear, Congress' concern was protecting disabled persons in free society.

It is no answer that Congress intended the ADA to apply to inmates because many of them are eventually released and "have the same interest in access to the programs, services, and activities available to the other inmates of their prison as disabled people on the outside have to the counterpart programs, services, and activities available to free people." *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997). The Equal Protection Clause already prohibits state prison administrators from engaging in irrational discrimination against disabled inmates; 42 U.S.C. § 1983 provides remedies for such violations. Imputing to Congress an intent to provide inmates with substantive protections in excess of those provided by the Equal Protection Clause not

only raises a troublesome constitutional question over the scope of Congress' powers to enforce the Fourteenth Amendment, see *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), it also interjects the federal courts into the most complex questions of the States' penological policies.

The Court has repeatedly recognized that statutes should be construed to avoid serious constitutional questions "unless such [a] construction is plainly contrary to the intent of Congress." *New York v. United States*, 505 U.S. 144, 170 (1992) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); see also *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1917) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). Because there are numerous indications in the statute that Congress did not intend for the ADA to apply to state prisoners, the Court should adopt a construction that avoids these constitutional questions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *

Chief Counsel

JAMES I. CROWLEY

STATE AND LOCAL LEGAL CENTER

444 North Capitol Street, N.W.

Suite 345

Washington, D.C. 20001

(202) 434-4850

* Counsel of Record for the

Amici Curiae

March 4, 1998

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Supreme Court, U. S.

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No. 97-634

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

vs.

RONALD R. YESKEY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit**

**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

*Attorney of Record

33 pgs

QUESTION PRESENTED

Does the Americans with Disabilities Act apply to inmates in state prisons?

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Respondent.

**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF THE PETITIONERS**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

In the 1960s and early 1970s, lax punishment policies were followed by a sharp increase in crime rates. In the 1980s and 1990s, larger sentences were followed by a sharp drop in crime.

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

This greater protection of law-abiding people from violent criminals comes at a cost, however. As the prison population rises, the cost brings calls to repeat the mistakes of the past and once again let criminals off with short sentences. This problem is aggravated by requirements that unnecessarily drive up the cost of running prisons.

Application of the Americans with Disabilities Act to state prisons would drive up the cost with its vague requirements and extensive litigation. By increasing the financial pressure to turn criminals loose, it would be contrary to the interests of law-abiding people and victims of crime which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Ronald Yeskey, a Pennsylvania prison inmate, was denied admission to a motivational boot camp program run by the state's Department of Corrections. *Yeskey v. Pennsylvania Dept. of Corrections*, 118 F. 3d 168, 169 (CA3 1997). The boot camp requires rigorous physical activity from its participants. *Id.*, at 169, n. 1; see also 61 Pa. Stat. Ann. §§ 1123, 1126(d) (Purdon Supp. 1997). Yeskey, who has a history of hypertension, was found to be medically ineligible for the program by the Department of Corrections. See Pet. for Cert. 3.

Yeskey filed suit, claiming that by refusing to place him in the program, the Department of Corrections violated the Americans with Disabilities Act ("ADA"). He sought "damages and declaratory and injunctive relief, including an injunction requiring the defendant to release plaintiff from confinement on the date he would have been released if he had been allowed into the boot camp program." App. to Pet. for Cert. 15a.² The District Court dismissed the complaint, finding the

2. Apparently, neither the District Court nor the Court of Appeals noticed that it lacked subject matter jurisdiction to order early release. Habeas corpus is the exclusive remedy. See *Preiser v. Rodriguez*, 411 U. S. 475, 500 (1973).

ADA inapplicable to state prisons. *Id.*, at 18a-19a. The Court of Appeals reversed. *Yeskey*, 118 F. 3d, at 170-172; Pet. for Cert. 3. The Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari. Pet. for Cert. 13. The petition was granted on January 23, 1998.

SUMMARY OF ARGUMENT

The constitutional question of whether the ADA could validly apply to state prisons is properly before this Court. The question is whether the Act *does* apply, not merely whether it was *intended* to apply. In addition, a constitutionally doubtful construction should not be adopted if that can be avoided.

Application of the ADA to state prisons would not be a valid exercise of Congress's enforcement power under the Fourteenth Amendment. Such application would prohibit large amounts of constitutional state action, far out of proportion to any actual equal protection violations. Under *City of Boerne v. Flores* and *Oregon v. Mitchell*, such laws are not within the enforcement power.

Application of the ADA to state prisons is not within the commerce power. Prisons are not commercial activities. Applying the ADA to them would not enhance or protect any interstate market to any appreciable degree. The arguments that might be made for such application are precisely those rejected in *United States v. Lopez*.

Outside of enforcing the Civil War Amendments, Congress has no authority to regulate the states as states. Cases allowing laws of general applicability to apply to states are inapposite here, even assuming they have survived more recent cases. The section in question attempts to commandeer state resources to carry out Congressional policy directives. Application of this section to a core government function such as prisons would violate the doctrine of *New York v. United States* and *Printz v. United States*.

ARGUMENT

I. The constitutional issue may properly be considered in answering the question presented.

The question presented in the present case is "Does the Americans with Disabilities Act apply to inmates in state prisons?" Pet. for Cert. i. Respondent contends that "the question of the constitutionality of applying the ADA to state prisons is not properly before this Court" and urges a restriction of the question to statutory interpretation. Brief in Opposition 19.

There are two reasons why the question should not be so restricted. First, the constitutional issue is not cleanly severable from the interpretation issue. Second, a decision that Congress intended the ADA to apply, without deciding whether it constitutionally could, would fail to resolve the ultimate issue.

A. Statutory Interpretation and Constitutionality.

Many times over many years, this Court has stated a basic rule of interpretation of statutes. If the statute has two plausible interpretations, one clearly constitutional and the other doubtful, the clearly constitutional interpretation should be adopted. See, e.g., *Edward J. DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U. S. 568, 575 (1988). To apply this rule, the constitutional issue must be considered before the statutory interpretation question is definitively answered. That is, the question of whether respondent's interpretation of the statute (*i.e.*, the ADA applies to state prisoners) would be constitutional must be investigated before that interpretation can be accepted as correct. If the Court were to ignore constitutional considerations while settling on this interpretation, it would then be faced in the next case with a constitutional question that might have been avoided by choosing petitioners' interpretation.

Respondent states that petitioners did not raise the constitutional issue in the Court of Appeals, and hence that it was not

decided there. Brief in Opposition 18. Petitioners' argument, though, is new authority for a consistent position and not a new position. That is, petitioners contend that the ADA does not apply to state prisons; and the argument that the contrary construction would be unconstitutional, and hence should be avoided, is a new argument, supported by new authority, for that consistent position. The interpretation of the statute is a question of law to be "resolved *de novo* on appeal." *Elder v. Holloway*, 510 U. S. 510, 516 (1994). A court resolving a question of law "should therefore use its 'full knowledge of its own [and other relevant] precedents.'" *Ibid.* (quoting *Davis v. Scherer*, 468 U. S. 183, 192, n. 9 (1984)).

The argument that respondent's interpretation of the statute would be unconstitutional can, and indeed must, be considered as an essential part of the interpretation process.

B. Constitutionality *Per Se*.

If the Court adopts respondent's interpretation of the statute despite its doubtful constitutionality, the question would then arise whether the Court should definitively resolve whether the statute, as so construed, was within the power of Congress to enact. In that event, there are two potential arguments against the Court addressing the question, both of which are weak, and one strong argument for resolving it.

One potential argument would be that the constitutionality of the ADA as applied to state prisons is not "fairly included" in the question presented. See Supreme Court Rule 14.1(a). Although *amicus* CJLF does not understand respondent's Brief in Opposition to make such an argument, a few words about why the issue is "fairly included" are in order.

The question of whether an Act of Congress applies to a particular situation necessarily includes both the interpretation question of whether it was *intended* to apply and the constitutional question of whether it *could* apply. See, e.g., *Marbury v. Madison*, 1 Cranch 137, 173 (1803).

The fair inclusion of the question is much more clear in this case than it was in *Caspari v. Bohlen*, 510 U. S. 383 (1994). In that case, the stated question was “ ‘[w]hether the Double Jeopardy Clause . . . should apply to successive non-capital sentence enhancement proceedings.’ ” *Id.*, at 389 (quoting certiorari petition). The question actually decided by *Bohlen* was that an affirmative answer would be a new rule which could not be created on habeas corpus. *Id.*, at 396-397. The latter question was not “subsidiary” on the face of the question presented; the “threshold” nature of the *Teague* inquiry was based on the law of habeas corpus, which was not mentioned in the question.

In the present case, by contrast, the constitutional issue is presented on the face of the question. The question is not whether Congress *intended* the ADA to apply to state prisons but whether it *does* apply. It does not apply if its application would be unconstitutional. Indeed, respondent’s attempted modification of the question, see Brief in Opposition i, 19, effectively acknowledges this.

Respondent argues that the issue of constitutionality was not raised in or decided by the Court of Appeals. *Id.*, at 18. Unlike the consideration of constitutionality in the interpretation process, see *supra*, at 4-5, this point has some weight as applied to constitutionality *per se*. As a general rule, questions not considered below are not considered in this Court. *Taylor v. Freeland & Kronz*, 503 U. S. 638, 646 (1992).

General rules, though, have exceptions, as does this one. A “purely legal question” may be “ ‘appropriate for [this Court’s] immediate resolution’ notwithstanding that it was not addressed by the Court of Appeals.” *Mitchell v. Forsyth*, 472 U. S. 511, 530 (1985) (quoting *Nixon v. Fitzgerald*, 457 U. S. 731, 743, n. 23 (1982)). The constitutional question here involves no findings of fact and is appropriate for immediate resolution.

Courts generally exist to resolve concrete disputes and not to opine on abstract questions. See *Coleman v. Thompson*, 501 U. S. 722, 729 (1991) (no advisory opinions). This Court, in

particular, exists to settle finally questions of national importance. See *The Federalist* No. 22, p. 150 (C. Rossiter ed. 1961) (A. Hamilton). If this Court were to decide that the ADA was *intended* to apply to state prisons, yet disclaim any opinion on whether it *validly may* apply, what would that settle? Arguably, it could settle Mr. Yeskey’s individual claim on a theory of procedural default of the constitutional question. For that reason, *amicus* does not contend that there is an Article III imperative to resolve the constitutional question. But this Court does not grant certiorari to settle individual claims on case-specific points. See, e.g., *Heck v. Humphrey*, 512 U. S. 477, 480, n. 2 (1994) (noting Court did not take the case to review a fact-bound issue).

The great question which prison administrators and state budget planners wait to have answered is whether they are bound by law to comply with the ADA. The possible complete answers are: (1) no, because the ADA, properly construed, does not apply to state prisons; (2) no, because the ADA, as so applied, is unconstitutional; or (3) yes, because the ADA is both applicable and constitutional. Any less complete answer will leave the prison administrators in legal limbo.

II. The ADA is not a valid exercise of Congress’s Fourteenth Amendment enforcement power.

Section 5 of the Fourteenth Amendment confers upon Congress the power to enforce the Amendment by appropriate legislation. That section did not authorize the destruction of the federal system and its replacement by a unitary government, with the state as mere departments. See *City of Boerne v. Flores*, 521 U. S. ___, 138 L. Ed. 2d 624, 639-641, 117 S. Ct. 2157, 2164-2166 (1997). When the ink was barely dry on the Amendment’s ratification, this Court declared, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *Texas v. White*, 7 Wall. 700, 725 (1869), overruled on other grounds, *Morgan v. United*

States, 113 U. S. 479, 496 (1885). Section 5 of the Fourteenth Amendment did not change that.

Everyone can agree that the accommodation of disabled persons and their access to government programs is a desirable goal. The worthiness of the goal, however, does not justify the means. Indeed, the first statute ever declared unconstitutional by federal judges was a highly commendable act for the relief of disabled veterans of the American Revolution and the widows and orphans of those who had fallen. Understandably, the judges were somewhat embarrassed in announcing their decision that Congress had violated the separation of powers in its choice of means to implement this salutary law, but announce it they did. *Hayburn's Case*, 2 Dall. 409, 410, n. (1792).

So it is in this case. If Congress had really intended to give disabled prisoners full access to all prison "programs," as respondent contends, it could unquestionably have done so under the spending power by providing the necessary funds and conditioning receipt on compliance with certain standards. See *South Dakota v. Dole*, 483 U. S. 203, 212 (1987) (constitutionality of such statutes); *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U. S. 176, 179 (1982) (describing Education of the Handicapped Act). Instead, the ADA invokes the Fourteenth Amendment and the commerce power. 42 U. S. C. § 12101(b)(4). Neither of these powers supports the application of the ADA to state prisons.³ *Amicus* will address the Fourteenth Amendment in this part and the commerce power in the next part.

The most straightforward, and least controversial, use of the Fourteenth Amendment enforcement power is to provide remedies to give practical effect to the substantive guarantees.

3. The lack of constitutional support, combined with the conspicuous absence of prisons and prisoners from the comprehensive lists in subdivision (a) of the same section, is further evidence Congress did not intend for the ADA to apply to state prisoners.

For example, the Fourteenth Amendment, by its own force, forbids racial discrimination in selecting juries, see *Strauder v. West Virginia*, 100 U. S. 303, 308 (1880), but only Congress can make such discrimination a crime and punish it. See 18 U. S. C. § 243; *Ex parte Virginia*, 100 U. S. 339, 345-346 (1880); cf. *Liparota v. United States*, 471 U. S. 419, 424 (1985) (no federal common law crimes). The difficult question arises when Congress purports to prohibit a state government practice which does not violate the Fourteenth Amendment.

Katzenbach v. Morgan, 384 U. S. 641 (1966) was once thought to stand for the proposition that Congress could expand the protections of the Fourteenth Amendment beyond the substantive reach of the Amendment itself. That case involved a statute in which Congress had provided that persons educated in "American-flag schools" in languages other than English could vote, notwithstanding state English-literacy requirements. *Id.*, at 643.

The Court upheld the statute, thereby permitting Puerto Ricans to register to vote in New York, even if they could not read English. This result was reached without overruling a precedent that had upheld literacy tests as a general matter. *Id.*, at 649. On its facts, this seems an unobjectionable result. The act involved the right to vote on a ground related to ethnicity. While literacy tests may be generally valid, the judgment of Congress that in this limited situation those laws operated in practice to disenfranchise an ethnic group in violation of the Fifteenth Amendment⁴ was not necessarily inconsistent with that general rule.

The *Morgan* majority, however, used sweeping language "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *City of Boerne, supra*,

4. Puerto Ricans are, of course, not a "race" as that term is used today. In the Reconstruction era, though, the word "race" was used to mean smaller groups. See *Saint Francis College v. Al-Khazraji*, 481 U. S. 604, 610-611 (1987).

138 L. Ed. 2d, at 643-644, 117 S. Ct., at 2168. Subsequent cases have not followed that interpretation of *Morgan*.⁵

Oregon v. Mitchell, 400 U. S. 112 (1970) sounded the retreat. The Court was badly splintered, and only Justice Black concurred in all four of the Court's separate holdings. The issue most pertinent to the present question was Congress's attempt to lower the voting age to 18 in state elections, as well as federal, thus invading the traditional power of the state to regulate its own elections.

Justice Black interpreted the Fourteenth Amendment as giving Congress authority to regulate in this area only to prevent racial discrimination. *Id.*, at 130. Justice Harlan expressly rejected the "notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan*" *Id.*, at 209 (opinion concurring in part and dissenting in part). The provision's "validity therefore must rest on congressional power to lower the voting age as a means of preventing *invidious discrimination that is within the purview of [the Equal Protection] clause*." *Id.*, at 212 (emphasis added). Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, took a narrower view of *Morgan*. They understood that it had merely upheld Congress's determination that there had been actual discrimination against Puerto Ricans in New York, an Equal Protection violation by any standard, and that the extension of the vote was the remedy for this violation. *Id.*, at 295-296 (opinion concurring in part and dissenting in part).

Viewed through the retrospective lens of *Marks v. United States*, 430 U. S. 188, 193 (1977), the opinion concurring on the "narrowest grounds" is probably Justice Stewart's. Congress has the power "to provide the means of eradicating situations

5. "The broad language in *Morgan*, purporting to give Congress power to define equal protection, was unnecessary to the decision of the case. The Court's language appears to be an alternative holding rather than dictum, but subsequent decisions show that the Court has retreated from the more farreaching implications of *Morgan*." 3 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 19.3, p. 529 (2d ed. 1992).

that amount to a violation of the Equal Protection Clause" *Mitchell*, 400 U. S., at 296. It does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause" *Ibid.* To the extent *Morgan* may have been contrary, it did not survive *Mitchell*.

The other relevant holding of *Mitchell* involved Congress's temporary suspension of all literacy tests for voting nationwide. Given the sorry history of the racially discriminatory use of these tests to violate the very core of the Fifteenth Amendment, the Court had little trouble in agreeing unanimously that this was a proper exercise of Congress's enforcement power under that amendment. *Id.*, at 118, 132 (opinion of Black, J.). This included the *Morgan* dissenters. *Id.*, at 216 (opinion of Harlan, J.); *id.*, at 282-283 (Stewart, J., concurring in the judgment).

Taken together, these opinions indicate that before the enforcement power of Congress can apply there must first be a violation of the substantive requirements of the Fourteenth or Fifteenth Amendments. Where there are substantial violations, a remedy that sweeps in some nonviolations may be necessary. The problem of literacy tests provides a good example. Litigating each application of the tests to determine if it is discriminatory would be impractical, leaving the choice between tolerating large-scale violations of the Fifteenth Amendment or sweeping out some good-faith, nondiscriminatory uses of the tests along with the bad-faith uses.

The voting age question provides a clear counterexample. The 21-year-old voting age did not serve as an instrument for evading the Constitution. These clearly constitutional, if possibly unwise, statutes did not produce *de facto* constitutional violations on a large scale by burdening people deprived of their rights with case-by-case litigation. If these laws produced any constitutional violations at all, which is doubtful, the "remedy" included within its sweep vastly more constitutional applications than unconstitutional applications.

Twenty-seven years later, the question that fractured the Court in *Mitchell* produced not a single dissent in *City of Boerne v. Flores*, 521 U. S. ___, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). The question was whether Congress had the authority to forbid actions of state and local government that were constitutional under the Free Exercise Clause as construed in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), but which would have violated the rule of *Sherbert v. Verner*, 374 U. S. 398 (1963), abandoned in *Smith*.⁶ The only dissents were on the ground that *Smith* should be reconsidered. *City of Boerne*, 138 L. Ed. 2d, at 654, 117 S. Ct., at 2176 (O'Connor, J., dissenting); *id.*, at 667, 117 S. Ct., at 2186 (Souter, J., dissenting); *id.*, at 668, 117 S. Ct., at 2186 (Breyer, J., dissenting). Justice O'Connor largely agreed with the majority on the Congressional power question, *id.*, at 655, 117 S. Ct., at 2176, and Justice Breyer agreed in part. *Id.*, at 668, 117 S. Ct., at 2186. Justice Souter took no position on the point. *Id.*, at 667-668, 117 S. Ct., at 2185-2186.

City of Boerne confirmed, in a coherent majority opinion, the same conclusion that must be extracted from the splintered opinions in *Oregon v. Mitchell*. The power of Congress is remedial, not substantive. *Id.*, at 643, 117 S. Ct., at 2167. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.*, at 645, 117 S. Ct., at 2169. Congress cannot throw out a whole nursery full of babies to dispose of a few ounces of bath water.

Assuming *Smith* to be correct, as we must unless and until this Court overrules it,⁷ the act in question was "so out of proportion to a supposed remedial or preventive object that it

6. Congress's Fourteenth Amendment enforcement power is involved because the Free Exercise Clause is deemed to be incorporated in the Due Process Clause. See *City of Boerne*, 138 L. Ed. 2d, at 637, 117 S. Ct., at 2163.

7. See *Brown v. Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 646, 117 S. Ct., at 2170. "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Ibid.*

These words could just as easily have been written about the Americans with Disabilities Act, if it is construed as broadly as respondent and the Court of Appeals construe it. Every agency at every level of government must reexamine every program and decide whether to make modifications and provide the necessary "auxiliary aids and services" to accommodate a wide variety of disabilities. See 42 U. S. C. § 12131. If they cannot afford to do so, then they must terminate the program. In the case of prisons, where programs to benefit prisoners are under heavy assault already,⁸ termination may very often be the choice.

Cleburne v. Cleburne Living Center, 473 U. S. 432 (1985) established that mental retardation is not a "quasi-suspect classification" for the purpose of equal protection analysis. *Id.*, at 446. The test for differential treatment is therefore whether the distinction is "rationally related to a legitimate government purpose." *Ibid.* For the reasons stated in *Cleburne*, the same rule should apply to the disabled generally.⁹

First, unlike race, disability is often relevant. Cf. *id.*, at 442-443. The most common reason for a refusal to make an accommodation is simply an unwillingness to spend the extra money required. See, e.g., *University of Texas v. Camenisch*,

8. For example, H. R. 667 § 401, passed by the House in the 104th Congress, would have removed all strength-training activities from federal prisons. It is not difficult to see how a lawsuit demanding accommodation in such a program, and the attendant expense, would be the last straw.

9. The author of a treatise on the subject, who generally takes an expansive view of rights of the disabled, concurs with this assessment. See L. Rothstein, *Disabilities and the Law* § 1.02, pp. 9-10 (1997).

451 U. S. 390, 392 (1981); *id.*, at 398-399 (Burger, C.J., concurring) (issue was not whether Camenisch could attend, but merely who would pay the additional expense). Expense would only be irrelevant in a program with unlimited resources. In the real world, expense is always relevant.

Second, the steady stream of legislation to benefit the disabled negates any notion that the disabled are the kind of politically powerless minority in special need of judicial protection from legislative animosity. Cf. *Cleburne*, 473 U. S., at 443-445.¹⁰ Indeed, the disabled seem to have a unique capacity to get Congress to act swiftly in reaction to any adverse decision from this Court. *Smith v. Robinson*, 468 U. S. 992, 1021 (1984), which denied attorney's fees under the Education of the Handicapped Act (EHA), was abrogated only two years later. See 20 U. S. C. § 1415(e)(4)(B). *Dellmuth v. Muth*, 491 U. S. 223, 232 (1989) held, as a matter of statutory construction, that Congress had not intended to abrogate Eleventh Amendment immunity in the EHA. Congress abrogated the specific holding of *Dellmuth* the next year. Pub. L. No. 101-476, 104 Stat. 1103, 1106 (1990).¹¹ *Atascadero State Hospital v. Scanlon*, 473 U. S. 234 (1985) met the same fate on the same point regarding the Rehabilitation Act. Pub. L. No. 99-506, 100 Stat. 1807 (1986).¹²

Other groups can only look at this astonishing record of legislative triumph with envy. It took victims of crime 43 years to correct the misinterpretation of the federal habeas corpus statute. Compare *Brown v. Allen*, 344 U. S. 443, 499 (1953) (Frankfurter, J., concurring) with 28 U. S. C. § 2254(d).

10. This point combines the *Cleburne* Court's second and third points.

11. Whether Congress actually had the authority to abrogate is another question. Although the state asserted Eleventh Amendment immunity in the District Court, App. to Pet. for Cert. 16a, it has not pressed that point here. The issue is presented in *Wilson v. Armstrong*, No. 97-686, certiorari pending.

12. There are many other statutes benefitting the disabled, of course. The history is described in Rothstein, *supra*, at 3-19.

Congress's declaration that the disabled are "relegated to a position of political powerlessness," 42 U. S. C. § 12101(a)(7), is far from self-validating. Indeed, it is close to self-negating. Any group with enough clout to convince Congress to declare it "powerless," in an obvious attempt to overturn one of this Court's precedents, is powerful indeed.

Cleburne's final point was that if the mentally retarded were accorded "quasi-suspect" status, a wide variety of other groups would be as well. 473 U. S., at 445-446. The *Cleburne* Court stated it was unwilling to do so. *Id.*, at 446. The obvious reason is that such a step would vastly increase judicial scrutiny of legislative decisions, with a corresponding abridgment of the people's right of self-government.

Applying the rational basis test, saving money is *always* a legitimate state interest. If more money is spent on a program, it must be either cut from another program, drained from the general economy through a tax increase, or borrowed so as to encumber the future.¹³ Of course, a state cannot save money by arbitrarily cutting off a disfavored group which is not distinguishable on any basis relevant to that goal. See *Plyler v. Doe*, 457 U. S. 202, 229 (1982) (exclusion of "undocumented" children from school). Where the higher cost of including a particular person is the very essence of the classification, though, it cannot be seriously contended that the distinction is not rationally related to the legitimate purpose.

Obviously, the requirement to modify practices and provide "auxiliary aids and services," 42 U. S. C. § 12131(2); *id.*, § 12132, sweeps vastly further than the Equal Protection Clause. Under *City of Boerne*, this statute cannot be an exercise of Congress's enforcement power under the Fourteenth Amendment.

Unlike the Religious Freedom Restoration Act, though, this statute does not fall, at least not in its entirety, when the

13. The federal government has a fourth option: print paper money. The states do not. U. S. Const., Art. I, § 10, cl. 1.

Fourteenth Amendment support crumbles. As we will describe in the next section, most of the statute in most of its applications is a valid exercise of the commerce power.

III. Application of the ADA to state prisons would not be within the commerce power.

Since 1937, the power of Congress to regulate interstate commerce, U. S. Const., Art. I, § 8, cl. 3, has been understood to give Congress sweeping authority over commercial activity, even local businesses with only indirect effects on interstate commerce. This power includes a minimum wage law for employees of businesses which affect, but do not engage in, interstate commerce. *United States v. Darby*, 312 U. S. 100, 117 (1941). The power extends to a prohibition against racial discrimination by "Ollie's Barbecue," a local restaurant which purchases food that has moved in interstate commerce. *Katzbach v. McClung*, 379 U. S. 294, 296-297, 305 (1964). Whatever the validity of this expansive interpretation as an original matter, it is now too deeply ingrained in the national fabric to overturn. See *United States v. Lopez*, 514 U. S. 549, 574 (1995) (Kennedy, J., concurring); *id.*, at 601 (Thomas, J., concurring) ("wholesale abandonment" not required).

With each expansion of the commerce power, the Court reiterated that there were limits, and that the limits would be enforced. See *id.*, at 557-558 (collecting cases). Yet until *Lopez* one could legitimately wonder whether the limits were rainbows that invariably vanished when approached.

Congress finally hit the wall in *Lopez*. That case involved a federal criminal statute prohibiting possession of a firearm in a school zone. *Id.*, at 551. "The Act neither regulates a commercial activity nor contains a requirement that the possession be in any way related to interstate commerce." *Ibid.* Congress had exceeded its commerce power. *Ibid.* The present case is very closely analogous.

After tracing the history of the Commerce Clause cases, *Lopez* concluded that there are "three broad categories of activity that Congress may regulate under its commerce power." *Id.*, at 558.

"First, Congress may regulate the use of the channels of interstate commerce. See, e.g., *Darby*, 312 U. S., at 114; *Heart of Atlanta Motel*, *supra*, at 256 ('[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question' (quoting *Caminetti v. United States*, 242 U. S. 470, 491 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, e.g., *Shreveport Rate Cases*, 234 U. S. 342 (1914); *Southern R. Co. v. United States*, 222 U. S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, *supra*, at 150 ('[F]or example, the destruction of an aircraft (18 U. S. C. § 32), or . . . thefts from interstate shipments (18 U. S. C. § 659)'). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U. S., at 37, i.e., those activities that substantially affect interstate commerce, *Wirtz*, *supra*, at 196, n. 27." *Id.*, at 558-559.

For the final category, *Lopez* clarified that the effect on interstate commerce must be substantial. *Id.*, at 559.

In the present case, as in *Lopez*, the first two categories are easily dismissed. Prisons are not, by any stretch of the imagination, channels of interstate commerce. Nor is any instrumentality of commerce or person or thing in commerce endangered here. If application of the ADA to prisons could be sustained under the commerce power, it could only be under the "substantially affects" branch. Cf. *ibid.*

Among cases upholding the exercise of the commerce power, the most tenuous effect on interstate commerce can be found in *McClung*. The theory there was that discrimination reduced the amount of meat sold interstate and led to less interstate travel. 379 U. S., at 300. The thinness of this theory is offset by the fact that McClung was engaged in a purely commercial activity. He bought tangible goods in an interstate market and resold them. The least commercial activity, on the other hand, can be found in *Wickard v. Filburn*, 317 U. S. 111 (1942). While Filburn did not buy or sell wheat, his production of wheat for consumption on his own farm directly reduced the demand for wheat in the market. His activity, therefore, affected the commerce that was the central purpose of the statute, see *id.*, at 128, and not merely a peg on which to hang a law enacted for other reasons.

A state prison is typically not engaged in any commercial activity other than buying goods to be consumed there.¹⁴ Application of the ADA might result in an increase in the level of expense in running a prison, but that would not be likely to have any appreciable effect on interstate commerce, especially if the state compensated for the increased cost of some programs by cutting others. Application of the ADA to prisons "is not an essential part of a larger regulation of economic activity" *Lopez*, 514 U. S., at 561.

The one finding in the statute that would support a connection between prisons, disabled persons, and commerce, is that "dependency and nonproductivity" impose costs on society. See 42 U. S. C. § 12101(a)(9). Conceivably, the inability of a prisoner to participate in a truly rehabilitative program could reduce his chances of being economically self-sufficient upon release, and thus a drag on the economy. This is indistinguishable from the "effect on classroom learning" rejected as insufficient in *Lopez*. 514 U. S., at 565; cf. *id.*, at 623 (Breyer,

14. A prison which made goods for sale in the market would be different. Congress can undoubtedly regulate the interstate shipment of prison-made goods. See 18 U. S. C. § 1761.

J., dissenting). Similarly, an argument that prisons might be on "the commercial side of the line" based on the magnitude of their consumption or because, ideally, they would equip prisoners with the skills to "go straight" is no different from the argument rejected as to schools. Compare *id.*, at 565 (majority) with *id.*, at 629-630 (dissent).

For prisons, as for schools, any rationale that would serve to uphold application of the ADA under the commerce power would serve to justify federal regulation of every detail of running the prisons. The federal judiciary has been backing away from "micromanagement" of state prisons in recent years. See *California Dept. of Corrections v. Morales*, 514 U. S. 499, 508 (1995). Congress has recently added a big push in the same direction. See generally, Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-1366. Allowing litigation such as the present case would "run counter to the view expressed in several of [this Court's] cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U. S. 472, 482 (1995). Indeed, precisely the claim at issue here, participation in a prison "boot camp" program, was cited in *Sandin* as the kind of litigation "squandering judicial resources with little offsetting benefit to anyone." *Id.*, at 482-483.

The management of state prisons is a core function of state government. Decisions as to what programs to establish in them, how much to spend on them, and who ought to participate in them are the kinds of decisions that go to the essence of governmental discretion. If the ADA applied to state prisons, it would "foreclose[] the States from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise,¹⁵ and it [would do] so by regulating an activity beyond the realm of commerce in the

15. Cf. *Preiser v. Rodriguez*, 411 U. S. 475, 492 (1973).

ordinary and usual sense of that term." *Lopez*, 514 U. S., at 583 (Kennedy, J., concurring).

The particular program at issue here illustrates the importance of state variety and experimentation. Boot camps as correctional programs are controversial, with many expressing doubts whether they work. See Mathlas & Mathews, *The Boot Camp Program for Offenders: Does the Shoe Fit?* 35 Int'l J. of Offender Therapy & Comp. Criminology 322, 323, 326 (1991); Mackenzie, et al., *Boot Camp Prisons and Recidivism in Eight States*, 33 Criminology 327, 328, 353-354 (1995). The only way to know for certain is to try different variations and see which, if any, lower the rate of recidivism. See Mackenzie, *supra*, 33 Criminology, at 353-354. If all programs nationwide must be modified to accommodate a wide variety of disabilities, and if they fail, we will never know if the unmodified programs would have worked.

Nearly all of the Americans with Disabilities Act is within the commerce power. The employment title applies to employers "engaged in an industry affecting commerce" 42 U. S. C. § 12111(5). The public accommodations title is limited to private entities affecting interstate or international commerce. 42 U. S. C. § 12181(1), (6), (7). The bulk of Title II, regarding public services, is addressed to transportation. 42 U. S. C. §§ 12141-12161. Even before 1937, a state-operated railroad was subject to regulation under the commerce power, *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U. S. 342, 350 (1914), and similar services would fall under the same rule.

Prisons, though, are different. They are not commerce, and they are a core function of state government. Congress should not be deemed to have authorized, under the commerce power, pervasive regulation and litigation of a core function of state government with only the most tenuous connection to interstate commerce. If it did, it has exceeded its power, and the statute is unconstitutional as so applied.

IV. Other than the Civil War Amendments, Congress has no power to regulate the governmental operations of states.

"[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U. S. 144, 166 (1992); *Printz v. United States*, 521 U. S. ___, 138 L. Ed. 2d 914, 935, 117 S. Ct. 2365, 2377 (1997). If this Court meant what it said in *New York* and *Printz*, the ADA cannot apply to state prisons.

Cases involving regulation of states by the federal government fall into two groups. Most of the cases involve the application to the states of laws that apply equally to the private sector. *National League of Cities v. Usery*, 426 U. S. 833 (1976) and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), which overruled *National League*, fall into this group. See *New York*, 505 U. S., at 160 (collecting cases). A smaller group, including *New York* and *Printz*, involves Congressional commands directed specifically to state and local government.

The present case falls on the *New York/Printz* side of this line. Title II, Subtitle A of the ADA, the only part at issue, is directed only to "public entities." See 42 U. S. C. § 12132. "Public entity" means only state and local governments, their departments, and certain passenger rail entities. 42 U. S. C. § 12131(1). Thus, while the statute at issue is part of a large package, much of which is directed to the private sector, the specific requirement is not a "generally applicable law[]" as *New York* uses that term. Cf. 505 U. S., at 160. Therefore, assuming *Garcia* survives *New York* and *Printz*, this case is governed by *New York* and *Printz* and not by *Garcia*.

Coyle v. Smith, 221 U. S. 559 (1911) appears to be the first case to squarely confront the question of direct regulation of a

state by Congress.¹⁶ *Coyle* held that Congress could not direct the State of Oklahoma where to locate its capital. *Id.*, at 579-580.

What would be the result if the facts of *Coyle* were to come up today, in the post-1937 era of the vastly expanded commerce power? Certainly it would have a substantial effect on interstate commerce if Congress were to order the Commonwealth of Virginia to move its capital from Richmond to Arlington. Not only the government itself would move, but also the lobbyists, law firms, and other businesses that invariably accumulate around a government. Supplying the government and ancillary businesses would create a market for goods more accessible to merchants in Maryland and the District of Columbia, thus increasing interstate commerce to a considerably greater degree than the marginal increase in meat sales at Ollie's Barbecue. Cf. *Katzenbach v. McClung*, 379 U. S. 294, 300-301 (1964).

According to *Coyle*, the idea that Congress could issue this order "would not be for a moment entertained." 221 U. S., at 565. It would be no less absurd today. The conclusion inevitably follows that Congress's power to regulate under the Commerce Clause is less extensive than its power to regulate private businesses. The difference, as *New York v. United States* explains, is that the plan of the Constitution is for the federal and state governments to each regulate individuals, and not for the federal to regulate the state. See 505 U. S., at 164.

The original plan was, of course, greatly modified by the Fourteenth and Fifteenth Amendments. To insure that states obey the command of those amendments against racial discrimination, Congress has resorted to such intrusive measures as the requirement to "preclear" election changes with the Attorney General. See *South Carolina v. Katzenbach*, 383 U. S. 301, 327

16. *Lane County v. Oregon*, 7 Wall. 71, 77-78 (1869) avoided the constitutional question by construing the legal tender statute not to apply to state taxes, presaging the plain statement rule of *Gregory v. Ashcroft*, 501 U. S. 452, 460-461 (1991).

(1966). In part II, *supra*, we explained why the ADA cannot be sustained as an exercise of the Fourteenth Amendment enforcement power, and no other amendment is relevant. The amendments to the original constitutional plan, therefore, do not alter the conclusion.

In *New York v. United States*, the State of New York was forced to "a 'choice' of either accepting ownership of [nuclear] waste or regulating according to the instructions of Congress." 505 U. S., at 175. Each of these would be unconstitutional standing alone, so the forced choice was unconstitutional. *Id.*, at 176. The "take title" provision, standing alone, "would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.*, at 175. This "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Ibid.*

If a forced subsidy violates the anti-commandeering principle, then a requirement to provide "auxiliary aids and services" does as well. The reason goes to the heart of political accountability. Cf. *id.*, at 168-169. Government programs benefitting individuals are, by and large, popular. The taxes to pay for these programs, or the budget deficits when taxes are insufficient, are just as widely unpopular. To have any kind of political accountability and budget discipline, taxing and spending need to go together. Nothing would be more corrosive than for Congress to enact a popular but expensive program and impose the cost on the states.

Printz recognizes the same principle. "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 138 L. Ed. 2d, at 941, 117 S. Ct., at 2382. The state officials or legislators are the ones who must handle the downside. They must either raise state taxes or cut other programs, and they

must face the wrath of voters who will not always make the connection.

Setting priorities in spending lies at the heart of the discretion of governing. Even the most casual observer of the political scene knows that the budget bill is frequently the most hotly contested legislation of the year. Accommodating the disabled often costs money. See *University of Texas v. Camenisch*, 451 U. S. 390, 392 (1981). While this is a worthy goal, many other worthy goals also clamor for the state's money. In the American federal system, the places to resolve these competing demands are the state legislature and the elections for that legislature. Allocating the state budget is not a power of Congress. Cf. *Printz*, 138 L. Ed. 2d, at 970, 117 S. Ct., at 2404 (Souter, J., dissenting) (Congress cannot require administrative support without paying for it).

Application of the ADA to state prisons would be a direct regulation of the states by Congress, in an area outside the Fourteenth and Fifteenth Amendments. It would be a regulation of a core government function, not a commercial operation that happens to be run by a government. It would force the state to reallocate its own resources to meet federal policy priorities in preference to the priorities of the elected officials of the state. Such an application of this act is beyond the power of Congress.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

March, 1998

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

(7)
No. 97-634

Supreme Court, U.S.
FILED

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CLERK

**In The
Supreme Court of the United States
October Term, 1997**

*COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,,*

v.

RONALD R. YESKEY, Respondent.

*On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

BRIEF OF AMICI CURIAE

STATES OF NEVADA, OHIO, ALABAMA, ARIZONA, ARKANSAS,
CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, FLORIDA,
GEORGIA, TERRITORY OF GUAM, HAWAII, IDAHO, IOWA,
KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI,
MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW
MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA,
RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA,
TENNESSEE, TEXAS, UTAH, VIRGIN ISLANDS, VIRGINIA AND
WYOMING IN SUPPORT OF PETITIONERS

FRANKIE SUE DEL PAPA
Attorney General of Nevada
ANNE B. CATHCART
Counsel of Record
Sr. Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-4170

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
ELISE PORTER
TODD R. MARTI
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

[Additional Counsel Listed on Inside Cover]

21 PP

WILLIAM H. PRYOR, JR.
Attorney General
State of Alabama

GRANT WOODS
Attorney General
State of Arizona

WINSTON BRYANT
Attorney General
State of Arkansas

DANIEL E. LUNGREN
Attorney General
State of California

GALE A. NORTON
Attorney General
State of Colorado

JOHN M. FERREN
Corporation Counsel
District of Columbia

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

GUS F. DIAZ
Acting Attorney General
Territory of Guam

DON STENBERG
Attorney General
State of Nebraska

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

THOMAS J. MILLER
Attorney General
State of Iowa

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

FRANK J. KELLEY
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

PETER VERNIERO
Attorney General
State of New Jersey

DAN MORALES
Attorney General
State of Texas

TOM UDALL
Attorney General
State of New Mexico

JAN GRAHAM
Attorney General
State of Utah

DENNIS C. VACCO
Attorney General
State of New York

JULIO A. BRADY
Attorney General
Virgin Islands

MICHAEL F. EASLEY
Attorney General
State of North Carolina

MARK L. EARLEY
Attorney General
State of Virginia

HEIDI HEITKAMP
Attorney General
State of North Dakota

WILLIAM U. HILL
Attorney General
State of Wyoming

JEFFREY B. PINE
Attorney General
State of Rhode Island

CHARLES MOLONY CONDON
Attorney General
State of South Carolina

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INTEREST OF THE AMICI

The States of Nevada and Ohio, together with 34 other *amici* States and Territories, write to urge the Court to reverse the decision of the United States Court of Appeals for the Third Circuit. At stake in this matter is whether Congress made the Americans with Disabilities Act, 42 U.S.C. §12111, *et seq.* ("ADA"), applicable to State prisons, an issue that has wide-ranging consequences for the States. The States of course have a compelling interest in the control and management of their prisons. And because application of the ADA to State prisons makes the diverse prison-management objectives of punishment, deterrence and rehabilitation all the more difficult to achieve, we share Pennsylvania's concerns in this case.

Pennsylvania argues that when Congress enacts legislation that would affect core State functions and would upset the federal balance if made applicable to the States, it must make its intention to do so unmistakably clear. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). In support, we offer this brief to illustrate the impact of the ADA on the States' management of their prisons and to emphasize the serious constitutional questions implicated by extension of the ADA to State prisons.

SUMMARY OF ARGUMENT

State prison officials supervise the activities of convicted felons in an environment that necessarily involves a high degree of control. They must be able to classify and manage disabled and non-disabled inmates alike based upon sound principles of correctional administration, the first and foremost being the safety and security of prison employees and inmates. Though entirely well-intentioned, the ADA

markedly intrudes on these functions, and in the end interferes with what has long been deemed one of the States' core sovereign functions. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The intrusion has caused many practical problems. It has led to accommodation demands of all sorts, many of them exceedingly unreasonable in light of the environment in which they arise and all of them piled on top of the many accommodation requirements that the States already responsibly impose upon themselves.

A State prison system that houses State citizens convicted of violations of State law does not affect interstate commerce. *See United States v. Lopez* 115 S.Ct. 1624 (1995). Even the broad authority Congress has under the Interstate Commerce Clause to regulate commerce among the States therefore does not extend to this distinctly local activity.

The ADA also authorizes money-damages actions against the States in federal courts. This, too, exceeds federal authority because it compromises the States' immunity from suit under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1997). As *Seminole Tribe* makes clear, Congress may not use its Article I powers to circumvent limitations that the Constitution places on federal jurisdiction.

Congress no doubt may overcome these limitations on its power by relying on section 5 of the Fourteenth Amendment. But, in order to exercise this remedial power, it must establish a proper predicate for doing so -- which is to say, it must show that the States have violated the equal-protection rights of inmates by discriminating against them in the past, and even then only if the remedial legislation Congress enacts remains proportional to the nature of these

violations. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). No such showing, however, has been -- or could be -- made here. Extension of the ADA to the State's eminently local management of their prisons simply did not contain the requisite predicate for exercise of Congress's remedial power.

ARGUMENT

I. THE ADA UNDERMINES THE STATES' ABILITY TO MANAGE INMATES AND TO ALLOCATE LIMITED RESOURCES WITHIN THEIR PRISON SYSTEMS.

The management of state prisons represents an integral part of the criminal justice system of each State. Indeed, it "is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

In managing frequently-dangerous criminals, prison officials regularly make decisions affecting the safety and security of inmates committed to their custody. This occasionally means that disabled and non-disabled inmates are treated differently. Accommodation of disabled inmates, whether they suffer from a mental or physical disability, simply does not always work in a prison setting. For example, it may not be appropriate to supply a prosthetic device to a violent, but disabled, inmate -- not because the State lacks sensitivity to the inmate's plight but because a heavy prosthetic device may be used as a weapon and thereby pose security risks. In order to preserve internal safety and security, prison administrators must remain free to adopt and

carry out policies and practices that require treating inmates with different disabilities differently.

Even without the ADA, moreover, State prison officials already face obligations that require some accommodation of disabled inmates. Under the Eighth Amendment, the States of course cannot be deliberately indifferent to inmates' serious medical needs, whether the inmates are disabled or not. What the ADA does, however, is put disabled inmates in a special additional category, entitling them to greater consideration. Outside the prison context, to be sure, this may make sense. But in the prison setting, the perception that other inmates are receiving special treatment (deserved or not) often results in management problems for prison administrators.

But the real problem is the wide breadth of claims covered under the ADA, many of them simply unsuitable for realistic management of a State prison. The legislation covers just about every physical and mental ailment that an inmate could possibly have. See 28 CFR Ch. 1 (35.104 Definitions). Not surprisingly, a whole host of ADA-based claims have been filed throughout the country. Consider the following: HIV- positive inmate and wife claimed a right to conjugal visits (*Bullock v. Gomez*, Case No. CV-95-6634, U.S. District Court of California); inmate with alleged mobility impairment claimed a right to an exemption from wearing restraints (*St. Pierre v. McDaniel*, Case No. CV-N-94-792-ECR, U.S. District Court for the District of Nevada); arthritic inmate claimed right to touch-sensitive typewriter (*Halpin v. Mathews*, Case No. GC-G 94-1935, U.S. District Court for the Middle District of Florida); inmate with visual problems claimed a right to be transferred from maximum security prison (*Walker v. Washington*, Case No. 96 C 469, U.S. District Court for the Northern District of Illinois); inmate

with alleged sleeping disorder claimed a right to a single cell (*Couming v. Matesanz*, Case No. 96-7328, Middlesex Superior Court C.A.). In one Iowa case, later reversed, the district court held that an inmate housed in the infirmary was entitled to a personal TV with cable despite the availability of one in the day room. *Aswegan v. Bruhl*, 113 F.3d 109 (8th Cir. 1997).

In several class actions, inmates are demanding costly structural modifications to the prisons as well as access to programs, in some instances even after the State has a ready made large accommodations. In *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997), and *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), for instance, inmates and parolees with a variety of disabilities sought additional construction and system-wide classification changes, even though the State had already devoted millions of dollars providing facilities specially designed for the disabled. In light of the broad definition of disability under the ADA, a wide range of inmates may claim that their disability requires accommodation into all manner of prison services, activities and programs. The States of California and Florida, for example, have 39 and 31 prison-based ADA actions pending respectively.

One unfortunate consequence of this litigation onslaught is the elimination of programs designed to benefit inmates. In this case, for instance, Mr. Yeskey demanded admission to a prison boot camp program even though his hypertension disqualified him. Many state statutes authorizing boot camp programs require strenuous physical activity. See, e.g., Del.C. §6704, 6709; D.C. Code 1981 §24-821; Fla.S.A. §958.045; Texas C.C.P. Art. 42.12; Va. St. 53.1-67.1. If prison administrators are required to modify programs to accommodate inmates with disabilities that would

ordinarily disqualify them from the activity, the program will face either non-compliance with the statute or non-compliance with its underlying goals. In either event, States understandably will see little benefit to continuing with the program.

At the end of the day, decisions in prison systems simply are not made -- and have never been made -- in accordance with the same considerations that govern life outside prison walls. Compelling the complete accommodation of all inmates claiming disabilities interferes with the ability of prison administrators to keep safety and security the overriding concern of prison administration.

II. AN EXTENSION OF THE ADA TO STATE PRISONS WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

In arguing that the ADA does not apply to State prisons, Pennsylvania quite properly turns to the clear statement requirements of *Gregory v. Ashcroft*, 501 U.S. 453 (1991). As Pennsylvania correctly recognizes, and as we agree, an extension of the ADA to State prisons would raise several serious constitutional concerns.

The ADA's statement of "purpose," it is true, attempts to rely on the wide range of authority that Congress may exercise in this area. It thus

invoke[s] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. 12101(b)(4). Yet even the broadest invocation of congressional authority does not extend to an application of the ADA in prison settings.

A. Congress Lacks Authority Under the Commerce Clause to Apply the ADA in the Context of State Prisons.

As an initial matter, there is serious doubt whether Congress may regulate state prisons under the Commerce Clause. Under Article I, section 8 of the United States Constitution, Congress has authority only "[t]o regulate Commerce . . . among the several States." While the powers afforded to Congress under the clause remain broad, *see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), they are not unlimited, *see, e.g., United States v. Lopez* 115 S.Ct. 1624, 63 U.S.L.W. 4343 (1995).

Confirming the point, *Lopez* invalidated a federal law prohibiting possession of a firearm in a local school, concluding that it does not sufficiently affect interstate commerce to invoke Congress's Commerce Clause powers. In doing so, the Court rejected the argument that guns in schools may result in violent crime, which in turn could affect the national economy through higher insurance rates and reduced travel. At the same time, *Lopez* also rejected the argument that guns in local schools will handicap the educational process, lead to a less productive citizenry, and thereby also potentially affect interstate commerce. The Court held that such tenuous connections to interstate commerce would not support Congressional regulation of local affairs, and would come close to extending congressional authority under the Commerce Clause to a point of no return. 63 U.S.L.W. at 4348.

In many respects, Congress's efforts to regulate State prisons under the ADA parallel the deficiencies in its efforts to regulate the possession of guns near schools. Particularly when it comes to a State charged with housing citizens of its own State who have violated that State's laws, it would seem hard to fathom that the activity implicates commerce among the States. What connections there may be, moreover, are far too attenuated to supply the requisite connection to commerce. Whether it be the purchasing of food and other necessary supplies, or even the transfer of prisoners from one prison to another, neither type of activity suffices to convert what remains an inherently local activity into an interstate one. State prisons remain what they always have been: self-contained facilities designed to keep criminal offenders in one place, and most conspicuously not in interstate commerce.

As in *Lopez*, in short, so here: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 63 U.S.L.W. at 4348. The question of power here raises a serious constitutional question.

B. Congress Lacks Authority to Abrogate the State's Sovereign Immunity.

Even if Congress could extend the ADA to State prisons under its commerce clause powers, it could not use those powers to abrogate a State's sovereign under the Eleventh Amendment. Under that provision, States generally are immune from suit -- particularly money-damages actions -- in federal court.

In full, the Eleventh Amendment provides:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Am XI, U.S. Const. The amendment embodies a "broad constitutional principle of sovereign immunity" of the States. *Welch v. State Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987).

Most notably, in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1117 (1996), the Court made clear that Congress could not abrogate a State's sovereign immunity under its commerce clause powers. In doing so, the Court expressly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress could subject the States to money-damages actions in federal court and thereby waive their Eleventh Amendment immunity.

As the ADA permits prison inmates to file money-damages actions in federal court, it plainly implicates the States' Eleventh Amendment rights. Nor after *Seminole Tribe* may Congress tenably contend that it may abrogate this immunity under its commerce clause powers. Still, however, Congress retains power to abrogate these rights when it is acting under a valid grant of authority -- specifically, its remedial authority under Section 5 of the Fourteenth Amendment.

C. Congress Lacks Authority Under The Fourteenth Amendment to Apply the ADA in the Context of State Prisons.

Congress's Section 5 remedial power is the only way in which the legislature either could abrogate the State's immunity from suit or obtain power to regulate the intrastate activity of managing a local prison. However, under *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), it seems doubtful that this remedial source of authority exists here.

The Fourteenth Amendment provides in pertinent part:

Section 1...No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Although Section 5 is a "positive grant of legislative power," *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), this Court has never held that Section 5 authorizes Congress to establish rights not otherwise created by the Fourteenth Amendment except as a remedy for *constitutional* violations by the States. Indeed, Congress' Section 5 authority since the days of Reconstruction has been limited to outlawing or preventing state laws or practices that violate Fourteenth Amendment rights -- as that Amendment has been construed by the federal courts. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). See also, *Ex parte Virginia*, 100 U.S.

339, 348 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

City of Boerne v. Flores, 117 S.Ct. 2157 (1997) reaffirmed these holdings and more. It made clear that Section 5 authorizes Congress only to "enforce" the Fourteenth Amendment -- i.e., to "remedy" *actual violations* of the Fourteenth Amendment -- not to decree or redefine the substance of the Fourteenth Amendment's restrictions on the States:

Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

117 S.Ct. at 2163-64 (emphasis added).

Neither disability itself nor the record of the States' treatment of disabled prisoners appears to satisfy the required nexus between a Section 1 violation of the Fourteenth Amendment and the ADA remedy that *City of Boerne* requires. Disability is not a suspect or quasi-suspect classification and is therefore subject only to "rational basis" scrutiny under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), cert. denied, 510 U.S. 819 (1993); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1420 (10th Cir. 1992). What is more, the amici States are not aware of any extant record of state government activity involving any discriminatory animus against disabled

prisoners, let alone against individuals who work for the State.

As Congress only has the power to enforce substantive protections under the Fourteenth Amendment, not to create new ones, it cannot force the States to adopt a standard with regard to disabled inmates that is not constitutionally required by the Fourteenth Amendment. The ADA would force such a standard on State prisons.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to reverse the decision below.

Respectfully submitted,

FRANKIE SUE DEL PAPA
ATTORNEY GENERAL OF NEVADA

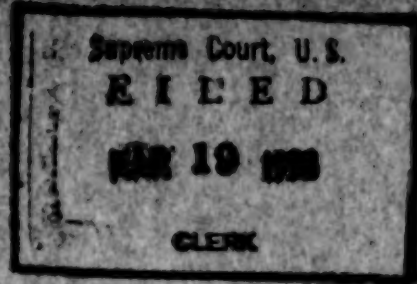
ANNE B. CATHCART
Counsel of Record
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3524

BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

JEFFREY S. SUTTON
State Solicitor
ELISE PORTER
TODD R. MARTI
Assistant Attorneys General
30 E. Broad Street
Columbus, Ohio 43215
(614) 466-8980

Counsel for the *Amici* States

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No. 97-634

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1997

**PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,
v.
RONALD R. YESKEY,
Respondent.**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

**BRIEF AMICI CURIAE OF
ADAPT, PENNSYLVANIA COALITION OF
CITIZENS WITH DISABILITIES and DISABLED IN
ACTION OF PENNSYLVANIA IN SUPPORT OF
RESPONDENT**

Stephen F. Gold*
125 S. 9th Street
Ste 700
Phila., Pa. 19107
(215) 627-7100

**Counsel for ADAPT,
PENNSYLVANIA COALITION OF CITIZENS WITH
DISABILITIES and DISABLED IN ACTION OF
PENNSYLVANIA
*Counsel of Record**

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AMICI CURIAE BRIEF OF
ADAPT, PENNSYLVANIA COALITION OF CITIZENS
WITH DISABILITIES and DISABLED IN ACTION OF
PENNSYLVANIA IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

Amici are three organizations, one national and two in Pennsylvania, composed primarily of persons with physical and mental disabilities, including persons with spina bifida, cerebral palsy, muscular dystrophy, spinal cord injuries, multiple sclerosis, quadriplegia, paraplegia, head and brain injuries, polio, amyotrophic lateral sclerosis, persons with sensory disabilities, including persons

Pursuant to 37.6 of the Supreme Court rules, none of the parties authored this brief in whole or in part and no one other than the amici or counsel contributed money or services to the preparation and submission of this brief.

who are blind or Deaf, and persons with cognitive and developmental disabilities. Many of these persons use assistive devices, including motorized and manual wheelchairs, white canes, ventilators, communication devices and personal assistance services for meeting their personal hygiene needs and transferring from bed to wheelchair.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* It was the plaintiff in the case ADAPT v. Skinner, U.S. Department of Transportation, 867 F.2d 1471, 881 F.2d 1184 (3d Cir. 1989) and filed an amici curiae brief in Vacco, et al. v. Quill, et al., 117 S.Ct 2293 (1997).¹

PENNSYLVANIA COALITION OF CITIZENS WITH DISABILITIES ("PCCD"), a statewide organization, is a consumer-controlled organization governed and staffed by individuals with

¹ All parties have consented in writing to filing of this brief. Copies of the written consents are on file with the Clerk of the Supreme Court.

diverse disabilities. PCCD's primary mission is to advocate for the civil rights of and governmental services for people with physical, sensory and mental disabilities, including prisoners in Pennsylvania who have disabilities.

DISABLED IN ACTION OF PENNSYLVANIA ("DIA") is an organization celebrating its twenty-fifth year of advocating for the civil rights of all persons with disabilities, including Pennsylvanians who are in nursing homes, prisons, and other institutions. DIA is comprised of people with physical and mental disabilities and has been the lead plaintiff in a number of lawsuits to increase accessibility to people with disabilities. *See, e.g. DIA v. Sykes*, 833 F.2d 1113 (3d Cir. 1987), *cert. denied*, 108 S.Ct 1293 (1988), *DIA v. Pierce*, 606 F.Supp. 310 (E.D. Pa. 1985), *aff'd* 789 F.2d 1016 (3d Cir. 1985).

SUMMARY OF ARGUMENT AND INTRODUCTION

Persons with disabilities face a complex maze of discrimination in the free world. Prisoners with disabilities face even harsher forms of discrimination in closed institutions and, without the protections of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, they will have no redress for and protection from the pernicious effects of discriminatory policies and practices.

As we will show, inmates with disabilities are all too often excluded from regular prison programs and services and, in addition, are subjected to inexcusable indignities, intentional discrimination, harassment and abuse, because of their disabilities.

All prisoners are relatively powerless. Amici ask only that prisoners with disabilities not be made more powerless or prone to mistreatment because of their disabilities. The ADA was intended to prevent discrimination against disabled people regardless of their location in our society. Of course, the situs of the differential treatment is important with respect to the state's duty to afford reasonable accommodations, and the treatment of disabled persons in prison must take into account issues of security, cost, and relevant administrative burdens.

In this Amicus Brief, we make two fundamental points. First, there is at the present time substantial evidence of ongoing, systemic and at times life and health threatening discrimination against persons with disabilities in the nation's prisons and jails. The ADA was intended to apply to all institutions in which disabled persons found themselves subject to discrimination based on their disabilities.

Second, the ADA requires only *reasonable* accommodations and modifications of existing policies and practices, not changes that might cause undue administrative and financial burdens. Petitioner and other States attempt to persuade the Court that compliance with the ADA will cause grave havoc in the prisons, but there presently exist numerous examples of reasonable accommodations and modifications of prison policies and practices that comply with the ADA, demonstrating that prison accommodations can be readily implemented and discrimination against people with disabilities eliminated.

The states have not and will not face great difficulties in adhering to the relevant ADA's standards. Only where there is proven discrimination based on disabilities and only where a "reasonable accommodation" can be provided is the state required to redress the effects of the discrimination. Of course, where the discriminatory conduct is manifested in abuse or a failure to protect, there can be no penological justification and the ADA rightfully demands a cessation of such treatment. The history of the application of the ADA to prisons demonstrates that reasonable accommodations are often easily made and that the law does not undermine legitimate security or prison administrative concerns.

Adjustments to prison programs and policies have been made by prison administrators with no proof of adverse effects on prison management.

ARGUMENT

I. Prisoners with Disabilities, Because They are Disabled, Are Intentionally Discriminated Against, Sometimes Abused and Hated, and, Are Denied And Excluded From Prison Services, Programs And Activities Nondisabled Prisoners Routinely Receive From Departments of Corrections

The ADA is the federal *civil rights* statute for people with disabilities. Congress recognized that people with disabilities were discriminated against in institutions, including prisons, jails, mental hospitals and nursing homes. 42 U.S.C. § 12101(a)(3). To prevent and remedy such discrimination, Congress mandated that no person with a disability, "by reason of such disability," shall be: (a) "excluded from participation in ...", or (b) "denied the benefits of the services, programs or activities," or (c) "subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphases added).² Eliminating discrimination against people with disabilities in prisons requires that disabled inmates be treated equally with

² It is important to note that Congress recognized that being "subjected to discrimination" is a distinct prohibition, separate from being excluded from participation or denied the benefits of a public entities' services, programs or activities. Many of the examples in the text, *infra*, demonstrate how prisoners are subjected to the discrimination of abuse and hatred "by reason of [their] disability."

nondisabled prisoners: their disabilities not be an excuse for segregating them from nondisabled prisoners; they have the same opportunities as nondisabled prisoners to work, recreation, education, sanitation, dining, and health care; and their lives not be perceived or treated as less valuable than nondisabled prisoners.

This Court should hear how prisoners with disabilities are treated by virtue of their disabilities. By hearing their stories, one can better understand why Congress intended to end discrimination against people with disabilities in every institution.

● J. Scottie Harrelson is a paraplegic who was denied the use of his wheelchair and forced to crawl around the cell. Harrelson v. Elmore County, Ala., 859 F.Supp. 1465, 1466 (M.D. Ala. 1994).

● Cleo Love, a quadriplegic who uses a wheelchair, was excluded, because he was disabled, from the prison's group substance abuse program, transition program, commissary, outside recreation, a prison job, and access to education and its law library. "Documentary evidence supports the conclusion that the discrimination had to be intentional...." Mr. Love requested access to school... for six years.... [The prisons's ADA Coordinator wrote] that Mr. Love and others were 'excluded from some programs and

services simply because of where they are housed and based only on their limitations'." Love v. McBride, 896 F.Supp. 808, 809-10 (N.D. Ind. 1995)(emphasis added), aff'd sub nom. Love v. Westville Correctional Center, 103 F.3d 558, 559 (7th Cir. 1996)(Plaintiff was denied use of "the prison's recreational facilities, its dining hall, the visitation facilities that were open to the general population, and ...was unable to participate in substance abuse, education, church, work or transition programs available to members of the general inmate population.")

● **Pete Grassia**, a paraplegic (T-12), used a wheelchair for mobility. A guard taunted Grassia over the loudspeaker so that everyone up and down the cellblock could hear: "Hey Grassia! Did you [defecate] in your pants yet? Need a new diaper, cripple?" Jay Mathews, Under a New Law, A Rising Sensitivity to Disabled Inmates? The Washington Post, Nov. 24, 1993, at A4. "Grassia said, he has been denied catheters, access to showers when he loses rectal control and water needed to keep bedsores from becoming infected. He also said he was left on the floor for several hours when he fell trying to use the toilet....[D]isabled inmates insist they are mistreated precisely because they cannot move as fast as [nondisabled] prisoners." Id. Peter Grassia has difficulty obtaining leg bags and

catheters, which should be changed every day. Because he was denied catheters, he had to "tape them when they leak, wash out the bags and reuse them as well. Anyone familiar with sanitary cath[eter] procedures knows the serious danger of sepsis such a practice courts." Jean Stewart, Inside Abuse: Disability and Oppression Behind Bars, The Disability Rag & Resource, Nov.-Dec. 1994 at 6.

● **Grant H. Hendrick**, a nondisabled prisoner, was engaged to **Linda Gail Niece** who was Deaf. She could not communicate with Hendrick over the telephone without a Telecommunications Device for the Deaf (TDD), a device with a keyboard and screen that easily hooks up to a telephone, permitting persons to type and receive messages over the screen. Ms. Niece purchased a TDD to donate to the prison so she could communicate with Mr. Hendrick. The prison "flatly refused to accept the TDD or provide Plaintiff with access to a TDD...." Niece v. Fitzner, 922 F.Supp. 1208, 1212 (E.D. Mich. 1996).

● **Gloria Johnson** had multiple sclerosis, a degenerative neurological condition. As her MS progressed, she had no use of her legs or arms, was blind and used a wheelchair for mobility. In her file, officials wrote "Do not overly coddle - perhaps

deliberately 'delay' calls for bedpan to assess self-function.... 'The nurses wouldn't do anything for me,' she said. 'They wouldn't help me eat. From Sunday evening at 8 p.m. to Tuesday at 2:30 p.m. I didn't use the bathroom at all.... One night I had to go to the bathroom, so I fell out of bed and tried to drag myself to the bathroom. I didn't make it.'" Nina Siegal, Death Behind Bars, San Francisco Bay Guardian, Feb. 5, 1997, at 16.

● Larry Noland is a semi-quadruplegic as a result of a broken neck. He cannot use his legs, has limited use of his left hand, and can use his right hand. He has no bladder, and he uses a colostomy and urostomy bag to remove body waste. He requires soap and water to clean his hands when he cleans or changes the bags. Mr. Noland was put in a cell without a bed, no running water, only an open drain in the floor for disposal of bodily waste.

"Even after a physician prescribed more water to keep Mr. Noland's system functioning properly, the defendants denied him a sufficient quantity of water. [Defendant] refused to bring Mr. Noland water when he requested it. The physician prescribed sixty-four ounces of water for Mr. Noland per shift, but Mr. Noland often received less than eight ounces each day.

"Initially, Mr. Noland was not allowed to shower as other inmates were, but could only sponge bathe himself every other day.... His showering time was limited to thirty minutes despite his difficulties

washing himself with only one arm. Mr. Noland had to dress and undress on the shower floor....

"When Mr. Noland spilled or got materials from one of his bags on his hands, he often had to wait as long as twenty-four hours to wash it off. As a result, he had to eat many meals with the human waste still on his hands.

"[When] Mr. Noland was moved to a regular cell ..., [he] could not sleep in the bed provided because his wheelchair did not fit through the door to the bed....

"Mr. Noland's wheelchair once had a flat tire. When approached, [defendant] forced Mr. Noland to get out of the wheelchair and crawl back to his cell to have the tire repaired. On another occasion, [defendant] refused to allow Mr. Noland to wash his hands although Mr. Noland had feces on his hands, explaining that it was not Mr. Noland's bath day. Mr. Noland had to wait until his bath day to wash the feces off his hands.

"[D]efendants forced Mr. Noland to sit in his wheelchair for nearly thirteen hours despite having been advised that two hours was the prescribed limit that Mr. Noland could sit in his wheelchair. Although Mr. Noland asked to be moved several times, he was told to wait. Pressure on a paralyzed individual's skin for more than two hours is a common cause of pressure sores. As a result, Mr. Noland's new skin graft was destroyed and his pressure sore reopened."

Noland v. Wheatley, 835 F.Supp. 476, 480-81 (N.D. Ind. 1993).

● Winfried Rhodes is blind. "Because of his blindness, he is required to eat all of his meals in his cell and is prohibited access to the dining hall, gym, vocational shops, and

educational facilities.... He is frequently subjected to psychological abuse by guards who sneak up behind him to frighten him, place tape across the doorway of his cell, and move the furniture around in his cell.⁴ Jean Stewart, Life, Death, and Disability Behind Bars, New Mobility, June 1998 (forthcoming).

● Easton Beckford has paraplegia and uses a wheelchair for mobility. The prison's sinks have push-button faucets difficult to operate from a wheelchair. "Easton Beckford ... said in an affidavit that he has to collect water by using a makeshift stopper and then lifting it in his hands to his body, causing some to spill on the floor. Several times [Beckford] has been given a 'deprivation order' for spilling waters, which means 'they turn the cell water on for only 15 minutes each day,' he said. 'That is my only opportunity to drink water, brush my teeth, clean myself and flush the toilet'." Jay Mathews, Under A New Law, *supra*. In 1994, "[Beckford's] wheelchair was taken away from him for months on end, rendering him unable to move from his bed. Both sink and toilet in his cell were inaccessible; Easton frequently soiled himself. As punishment for his complaints about lack of access, he's been denied permission to take showers in the shower room." Jean Stewart, Life, Death and Disability Behind Bars, *supra*.

● A Houston District Court stated that the

"straitened circumstances under which these inmates live are contrary to reason and common sense. Physically handicapped inmates must either manage as best they can, with virtually no special assistance, in physical environments which pose extreme difficulties for them, or spend their days vegetating, denied access to virtually all the programs and activities available to non-disabled inmates.... In short, [the Department of Corrections] provides essentially no accommodations for handicapped inmates which would enable them more effectively to function and contend with their desperately onerous situations in prison."

Ruiz v. Estelle, 503 F.Supp. 1265, 1340 (S.D. Tex. 1980).³

● Patty Contreras, who was five feet tall and weighed 80 pounds, had AIDS and also had grand mal seizures. She "slump[ed] in her wheelchair, barely able to lift her head." She, like other women who are HIV-positive or had AIDS, was "segregated into special prison yards," had her HIV status disclosed to fellow prisoners, and was "denied certain prison privileges, such as jobs and

³ The Ruiz decision points out numerous examples of discrimination that existed before the enactment of the ADA. Ruiz, *supra* at 1341-1343. Unfortunately, the decisions since Congress enacted the ADA in 1990 demonstrate that such discrimination still exists. As Congress pointed out, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals continue to be a serious and pervasive social problem ...[and] individuals with disabilities are ... subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals...." 42 U.S.C. § 12101(a)(2) & (7).

spousal visits." Nina Siegal, Infected - and Ignored, San Francisco Bay Guardian, Feb. 19, 1997, at 19.

● **Jerome Crowder**, a paraplegic serving a life term, was denied the use of his wheelchair. Being confined to his bed for almost four months, as it did not fit through the cell door, he developed decubitus ulcers. Crowder v. True, 1993 WL 532455 (N.D. Ill. Dec. 21, 1993).

● **Doris Clarkson, Mark Brock, Terryton Harrison and Riis Powell** were Deaf either since early childhood or from birth. All communicate using only American Sign Language (ASL). **Janice Whan, Glennis Robertson and Larry Randall** were hearing-impaired and communicated using ASL, lip reading or hearing aids. Although there were more than 50 inmates in the State's prisons who were Deaf and hard of hearing, "DOCS' Program Services Manual explicitly excludes disabled inmates from 26 academic and vocational programs.... An example of such exclusions is class member **Robertson** who was removed from a drug counseling program ...when correctional staff realized that she could not follow the group's discussions. She was then repeatedly denied access to such a program ... because of her disability." Clarkson v. Coughlin, 898 F.Supp. 1019, 1047 (S.D.N.Y. 1995). As

a result, in part, of **Robertson's** removal from the drug counseling program, she was denied her application for temporary release. Id. at 1031. All of the plaintiffs required a telephone communication device (TDD), a closed-captioned decoder for spoken words on telephone, and visual alarm system for emergencies such as building fires. Prison officials were also aware of prisoners who, because they were Deaf or hearing impaired, were denied participation in DOCS program and activities. Id. at 1028. **Clarkson** received no educational program and could not communicate with the Parole Board staff. Id. at 1029. **Whan** could not hear the fire alarm and could not use the telephone. **Brock** was denied the few programs available to nondisabled inmates "because he is deaf:" he could not participate in an Alcoholics Anonymous program and he "missed morning count because he could not hear the public announcement system." Id. at 1030. **Harrison** was "denied all programming because of his deafness and stayed in his cell twenty-four hours a day. At no DOCS facility was he permitted to participate in a group drug and alcohol rehabilitation program because he had no access to an interpreter." Id. at 1030. **Powell**, despite the sentencing Judge's letter and a presentence report requesting interpreters, was unable to

communicate with other inmates... rendering him isolated, and 'left out'." Id. at 1031.

● Prison officials removed the library from the 1st floor to the basement, making it inaccessible to inmates with disabilities. Robert M. Layne v. Supt. Mass. Corr. Inst. Cedar Junction, 406 Mass. 156, 546 N.E. 2nd 166 (1989).

● A prison system conducts mandatory HIV tests. HIV-positive inmates are segregated from other inmates and the DOC prohibits inmates who test positive from participating in most educational, vocational, rehabilitative, religious, and recreation programs offered in the state prisons. Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997).

● Richard Jackson is paralyzed from the waist down and uses a wheelchair. On Father's Day, he rolled to the visiting room to visit his father. The guard told him "he would have to be taken from his wheelchair for a strip and rectal search before his visit. Jackson, who wears a catheter because he can't control his bladder, refused because the guards had only a toilet seat on which to place him after removing him from the wheelchair. He asked to be taken to a nearby infirmary and searched under proper conditions. The visiting room guard wrote an 'incident report' against him for

disobeying an order, told his dad to leave, and rolled Richard to Isolation in his wheelchair." Dannie M. Martin and Peter Y. Sussman, Committing Journalism, 155-156 (1995).

● Jesus "Jesse" Montez is paralyzed on one side of his body and uses a wheelchair. Because of barriers to access in the prison, he has been "denied a job or access to other programs Mobility-impaired inmates have to rely on other inmates to carry them upstairs.... Jesse has lain on the floor in the shower several times because no one would pick him up."

"Montez was deprived of a wheelchair assistant because two prison employees decided, without any medical evaluation, that Montez should be more self-sufficient...."

"There are no jobs available for disabled inmates, so they can't work.... Then they're classified as idle inmates and so they lose privileges and are sent to facilities used for punitive segregation of inmates who don't work." Sue Lindsay, Paralyzed Inmate Sues State Prisons, Rocky Mountain News, Aug. 11, 1994 at 8A.

● William A. Wall was HIV-positive. Jail officials kept him "isolated in a one-man cell during his incarceration.... He said he was segregated from the remaining inmate populations because of his medical status and was therefore denied access to

programs, services, activities, and privileges ... includ[ing] religious programs, recreation, Alcoholics Anonymous meetings, watching television, library privileges, showers, a larger cell, interaction with other inmates in a cell block and regular removal of trash from his cell." Kim L. Hooper, HIV-Positive Man Agrees To Settlement, The Indianapolis News, Aug. 9, 1997 at W4.

● Timothy Purcell had Tourette's Syndrome. He had uncontrollable twitching, clicking and grunting. He has physical "tics" that "take the form of uncontrollable twitching, clicking and grunting. In some cases the verbal tics take the form of 'coprolalia,' in which [he] exhibits uncontrollable use of foul language." The Superintendent of the Pennsylvania DOC wrote, in response to the prison doctor's recommendation that Purcell be given permission to return to this cell whenever he needed to release his Tourette's tics in private, "'We are not going to allow you to hide behind your Tourette's Syndrome diagnosis.... You have got to learn that you are to follow lawful orders and not 'pick and choose' using Tourette's Syndrome to explain your inability to do what is expected'." Purcell had "allegedly previously been ridiculed and assaulted by inmates and guards who did not understand his condition." Shannon P. Duffy, ADA Applies to Prisoners, The Legal Intelligencer, Jan. 13,

1998, at 3. See Purcell v. Pennsylvania Dept. of Correction, 1998 U.S. Dist. LEXIS 105 (E. D. Pa. Jan. 9, 1998).⁴

● Carmen Jean Harris, Leslie John Pettway and James Hollifield were HIV-positive. The "DOC's policy ... uniformly segregat[ed] from the general prison population those prisoners who test positive" for HIV and are "assigned to one of two segregated HIV wards established by the DOC." Harris v. Thigpen, 941 F.2d 1495, 1498, 1500 (11th Cir. 1991). In addition, DOC had a "blanket exclusion of HIV-positive inmates from general prison population housing, educational, employment, community placement and other programs...." Id. at 1501. They were "categorically separated from virtually all aspects of general population institutional life, e.g., housing assignments, education, employment, recreation, dining, law library use, religious services, family visitation, transportation, sick call and canteen. As a result, they have not been able to participate in most of the programs available

⁴ Amici do not understand how Petitioner believes that Timothy Purcell's case could have "possible fiscal ramifications, and serious operational implications, of applying the ADA to prisoners." Brief of Petitioner at 15, n. 5. All the prison officials have to do is permit Mr. Purcell to return to his cell when he had "tics."

to general population prisoners, while in other cases, the segregated programming provided to them is not comparable." *Id.* at 1521-22.⁵

II. Reasonable Accommodations and Modifications of Prison Programs Exist For Persons With Disabilities In Compliance With the ADA, Demonstrating that With Minimal Effort Prisons Can Comply with the ADA and Not Discriminate Against Persons Because They Are Disabled

Reading Petitioner's and the States' amici curiae brief, one would think that disabled prisoners recently fell from another planet into state prisons and that no one has been able to effectively and reasonably accommodate prisoners who have disabilities. Nothing could be further from the truth.

Some wardens have had no difficulty making reasonable accommodations and modifications of programs. For example, at a Ohio Department of Rehabilitation and Correction facility for adult women, the warden wrote that "most accommodations necessary are

⁵ Petitioner fails to discuss the harsh realities of discrimination against prisoners with disabilities. Rather, their focus is on the alleged interference caused by the ADA on security and administrative concerns of prisons. If the ADA is not enforceable in the prison setting, systemic discrimination will continue to injure persons solely because of their disabilities. There are no other realistic remedies for the types of discrimination that disabled prisoners face. Constitutional claims under the Eighth and Fourteenth Amendment present often insurmountable burdens of proof regarding intent and malice, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986), the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626, places substantial limitations on the power of federal courts to remedy constitutional violations, and immunities preclude relief in a wide variety of contexts. Without the ADA's statutory protection, disabled prisons will be consigned to the kind of discriminatory treatment described above.

very easy and inexpensive to achieve.... Wheelchair ramps are required by law and are more easily achievable in the prison system than anywhere else because of the available labor to build them.... [M]ost accommodations are quite inexpensive." Barbara Brown Nichols, *Sensitizing Staff*, *The Disability Rag & Resource*, Nov.-Dec. 1994 at 21.⁶

A number of ADA complaints have been filed by prisoners with the United States Department of Justice's Disability Rights Section ("DOJ") that have resulted in settlements. Each settlement demonstrates that the ADA's requirements for reasonable accommodations and modifications of policies and programs are very doable in the prison context and do not present an undue administrative or financial burden. For example, a young man who is Deaf was denied a sign language interpreter or other means of effective communication during counseling sessions and was denied an interpreter for a disciplinary hearing. His mother, who has a mobility impairment, could not see her son, other than going down

⁶ This same warden wrote that "[j]ust ten years ago I saw a Deaf inmate wearing a sign saying 'DEAF MUTE.'" He was forced to wear the sign to avoid being disciplined for not responding to and obeying the correctional officers. Now prisons in Ohio provide Deaf inmates with closed captioned televisions, TDDs and licensed interpreters.... The biggest and best step was the simplest: learning to ask what accommodations are needed, then providing all reasonable requests. Barbara Brown Nichols, *supra* at 23.

two flights of stairs. She was denied access to an elevator located in the inmates' area. Prison officials entered a Settlement Agreement with DOJ agreeing to provide qualified interpreters and

"to afford ...an inmate an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity conducted by the Prison...[including] disciplinary hearings, individual and group counseling sessions, classes, and medical appointments... The Prison will give primary consideration to the requests of the inmates ... in determining what type of auxiliary aid or service is necessary..., [and] the Prison shall insure that the elevator leading to the visiting area is made readily available for the use of visitors with mobility impairments at all times that visitors are permitted in the facility."

Settlement Agreement Between the United States of America and the Prison of Chester County, Pa., Dept. of Justice Complaint Number 204-62-70 (Sept. 12, 1996).

Another example of a reasonable accommodation also involved a Deaf man who filed a complaint alleging the prison refused to provide him with a telecommunications device for the Deaf (TDD) that he requested to make outgoing telephone calls. Prison officials entered a Settlement Agreement with DOJ, agreeing to purchase and "to make the TDD's available to inmates and visitors in such manner as to make telephone communication as readily available to individuals with hearing impairments as such

communication is available to others without hearing impairments." Settlement Agreement Between the United States of America and the Lackawanna County Sheriff's Department, Lackawanna County, Pa., Dept. of Justice Complaint Number 204-62-47 (Jan. 25, 1996).

In another DOJ Settlement Agreement, to correct inaccessibility for persons with mobility impairments, the prison hired an architect who identified barriers to access that the prison agreed would be removed over the next few years. These barriers included adjusting door closets, providing telephones with volume control, replacing hardware on sanitary napkin dispensers, providing new 36" wide doors and frames, and modifying toilet stalls to accommodate a wheelchair. Settlement Agreement Between the United States of America and Autogamy County, Wisc., Dept. of Justice Complaint No. 204-85-40 (July 3, 1997).

In yet another DOJ Settlement Agreement, a prison agreed to house disabled inmates in a "regular inmate housing area, not [segregate them in] areas designated for inmates with 'special needs,' if regular housing is otherwise appropriate and requires no more than reasonable modification to housing conditions." Settlement Agreement Between the United States of America and the Wood

County Sheriff's Department, Bowling Green, Ohio, Dept. of Justice
Complaint No. 204-57-100 (June 5, 1997).

The American Correctional Association has recognized that people with disabilities are part of the prison population and can be reasonably accommodated without undue administrative and financial burdens on prison officials. "The good news is that more often than not, ingenuity, imagination and professionalism will go further toward solving the problem [of prisoners with disabilities] than money.... After all, the problem is not a new one; all that's new is the amount of attention it is receiving." Herbert A. Rosefield, Issues to Consider in Meeting Handicapped Offenders' Needs, Corrections Today, Oct. 1992 at 110.

With regards to custody and security problems, the common sense suggestion was made that prison "[o]fficers should be taught how to properly strip search a wheelchair-bound paraplegic, disassemble wheelchairs and prostheses, and otherwise conduct a proper shakedown.... Questions will arise concerning requirements for leg cuffs on paraplegics, waist chains across colostomy bags and even handcuffs for those on crutches. Custody should consult medical personnel when making these decisions." *Id.* at 111. Regarding programs, it was pointed out that "[w]hile finding

appropriate jobs may be difficult, handicapped inmates frequently prove to be excellent workers. All too often no attempt has been made to put these inmates to work, and they have been forced to sit back and watch other inmates earn incentive wages and days off their sentences without an opportunity to do likewise. Education and recreation also must be tailored for disabled inmates' needs and interests. This may mean anything from installing a ramp in the education building to organizing a one-on-one wheelchair basketball contest." *Id.* at 112.

Since Robert Yeskey, the Respondent in the instant case, Yeskey v. Commonwealth of Pennsylvania Department of Corrections, 118 F.3d 168 (3d Cir. 1997), was denied access to Pennsylvania's boot camp, based on an apparent blanket exclusion, it is interesting to hear how other authorities have made reasonable accommodations and modifications to their boot camps.

"Some correctional administrators are examining their boot camp programs and modifying their 'hard labor' provisions to incorporate activities that are within the physical or mental capabilities of inmates who have a disability. Inmates who have a physical impairment could be required to do comparable work involving mental tasks, such as recording readings of books for the visually impaired, typing materials in braille, helping to maintain and beautify grounds, and folding newsletters or stuffing envelopes (without addresses) for the agency... South Carolina has a modified community work

release program for older offenders and those with disabilities.... Participants... must meet all eligibility requirements of the regular work release program with the exception of health status. They must be able to work, but they do not have to be considered 'able bodied'."

Joann B. Morton and Judy C. Anderson, Implementing the Americans with Disabilities Act for Inmates, Corrections Today, Oct. 1996 at 88. None of these accommodations are undue administrative or financial burdens.

A DOJ's National Institute of Justice publication correctly noted that the ADA did not require any public entity to institute accommodations or to modify its policies or programs if the changes would amount to either a fundamental alteration or an undue financial and administrative burden. "Fundamental alteration of a program may occur when the modification is such that it changes the very nature of the program so that the facility would, in effect, be offering a different kind of program. For example, if a prison offers courses for college credit that require certain prerequisite courses not offered on the premises, the facility would not be required to offer them to inmates with disabilities who had not taken these prerequisite courses. To require the facility to offer such prerequisites would, in effect, require it to offer a completely different course." Paula N. Rubin and Susan W. McCampbell, The Americans With Disabilities

Act and Criminal Justice: Providing Inmate Services, Research in Action, July 1994 at 2.

Despite Petitioner's and State amici's attempts to portray reasonable accommodation in prisons as sui generis, the same criteria used to analyze whether an accommodation is reasonable in schools, welfare offices, housing programs, streets, or in the public entity's other programs, also apply to prisons. For example,

"[a]chieving program accessibility [in prisons] may mean relocating services and activities from an inaccessible site to one that is accessible, redesigning equipment, providing auxiliary aids for disabled beneficiaries of city correctional programs, and altering an existing structure....The type of auxiliary aid or service necessary to ensure effective communication will vary depending on the length and complexity of the communication involved. In routine matters, for example, the exchange of written notes with a deaf prisoner may be sufficient. However, where communication is more complex, extensive, or significant - for example, during classes, counseling sessions, or disciplinary proceedings - a qualified sign language interpreter may be required." Id. at 3.

Even those issues unique to prison can be easily dealt with.

For example, classifications decisions in prisons

"should be based solely upon risk factors shown to be relevant to the particular facility where the inmate is incarcerated [and not on a statewide or even necessarily prison-wide basis]. Some factors that might be considered include current criminal charges(s), past criminal charges, incidents of escape or attempted escape, and past institutional

behavior.... While it may be appropriate to place inmates using wheelchairs in first floor locations so they can be evacuated safely in the event of fire, these locations should be scattered among the various first floor housing units to the extent possible. If an inmate's disability is a factor in making a housing decision, this decision should be handled during the override phase of the classification process because inmates with disabilities are not routinely housed separately; rather, they are considered on a case-by-case basis. In other words, the same classification process should apply to inmates with disabilities and inmates without disability.... Valid reasons for segregating inmates with disabilities include the determination that a particular inmate poses a direct threat to the safety of others or has requested to be segregated. It is important that the justification for an override be based on objective information, not mere speculation." *Id.* at 4-6.

It is ironic that the Petitioner objects to the instant Third Circuit decision in Yeskey, because the Pennsylvania Department of Corrections entered into a comprehensive settlement under the Rehabilitation Act of 1973, 29 U.S.C. § 794, the ADA's predecessor, where the parties agreed to

"eliminate or, at least, minimize unlawful discrimination against HIV-infected individuals... The DOC has agreed that, as a general rule, HIV-infected individuals will be precluded from a work assignment only if the individual poses a direct medical threat to the health of others. Although negative reactions of DOC employees or other inmates generally will not be a sufficient ground to justify restrictions on the employment of HIV-positive individuals, on occasion, the DOC may

reassign or transfer an HIV-positive individual for security reasons."

Austin v. Pennsylvania Dept. of Corrections, 876 F.Supp. 1437, 1453 (E.D.Pa. 1995). Such reasonable modifications of policies demonstrate the ADA's flexibility.

Common sense is a large part of all reasonable accommodations. As the Los Angeles Times Editorial stated in response to a federal judge's ruling:

"The ruling ... will equalize conditions for disabled prisoners, ensuring that they will be subject to conditions no worse than those for all other prisoners.

"Surely there are solutions - assuming both sides want them and not to just score ideological points - that would allow disabled inmates to have the same rights as other inmates without costing needless taxpayer dollars.

"One example might be clustering inmates with a particular disability at a prison with appropriate facilities. Some accommodations such as making strobe light alarms available for the inmates, could be relatively easy to put in place. But many problems can be foreseen: As the prison population ages, more and more disabilities can be expected.

"This is an issue that will not go away. Disabled prisoners should be treated no better, but no worse, than other prisoners." Obey Law, and Common Sense, The Los Angeles Times Editorials, Sept. 24, 1996 at B6.

CONCLUSION

The ADA is the federal civil rights statute intended to end discrimination against all disabled persons, regardless of the institutions in which they are placed or reside. If this Court were to hold the ADA does not to apply in prisons, people with disabilities would be the only minority whose civil rights - unlike civil rights based on race, sex or religion - are "park[ed] at the prison gates." Crawford v. Indiana Dept. of Correction, 115 F.3d 481, 486 (7th Cir. 1997)(Posner, CJ.). Disabled prisoners will continue to be discriminated against and devalued because they are disabled. Your amici seek accommodations which will allow disabled prisoners to function equally to nondisabled prisoners.

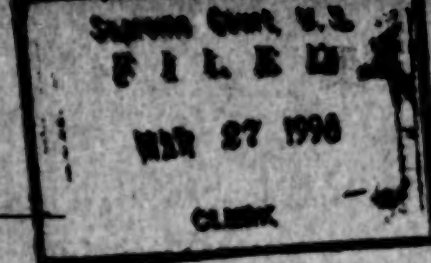
Respectfully submitted,

Stephen F. Gold*
125 S. 9th Street, Ste 700
Philadelphia, Pa. 19107
(215) 627-7100

Attorney for Amici Curiae
*Counsel of Record

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(9)
No. 97-634



**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1997

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS, et al.,**

Petitioners,

v.

**RONALD R. YESKEY,
Respondent.**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

**BRIEF OF AMICI CURIAE
THE NATIONAL ADVISORY GROUP FOR JUSTICE,
AMERICAN FOUNDATION FOR THE BLIND, DISABILITY
RIGHTS COUNCIL OF GREATER WASHINGTON,
NATIONAL ALLIANCE FOR THE MENTALLY ILL AND
NATIONAL ASSOCIATION FOR PEOPLE WITH AIDS IN
SUPPORT OF RESPONDENT**

**Barbara E. Ransom, Esquire
Judith Gran, Esquire*
125 S. 9th Street
Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7100**

Counsel for The Amici Curiae

***Counsel of Record**

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No. 97-634

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1997

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS, et al.,**

Petitioners,

v.

RONALD R. YESKEY,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

BRIEF OF AMICI CURIAE

**THE NATIONAL ADVISORY GROUP FOR JUSTICE, AMERICAN
FOUNDATION FOR THE BLIND, DISABILITY RIGHTS COUNCIL OF
GREATER WASHINGTON, NATIONAL ALLIANCE FOR THE
MENTALLY ILL AND NATIONAL ASSOCIATION FOR PEOPLE WITH
AIDS IN SUPPORT OF RESPONDENT**

INTERESTS OF AMICIC CURIAE

Amicus curiae National Advisory Group for Justice has been granted consent to participate in the briefing by all the parties and is joined by *amici curiae* American Foundation for the Blind, Disability Rights Council of Greater Washington, National Alliance for the Mentally Ill, and National Association for People with AIDS. All these *amici curiae* are deeply familiar with our Nation's history of invidious discrimination against individuals with disabilities and with the various legislative efforts to redress this discrimination, particularly the Americans with Disabilities Act, 42 U.S.C. §§ 12101- 12213 (ADA) (1990).¹

The *amici curiae* are: organizations comprised of persons with disabilities and their families; organizations instrumental in the drafting and enactment of the ADA and other civil rights legislation; organizations involved on a daily basis in shaping national policy on disability and other anti-discrimination issues, including the implementation of the ADA; and, organizations advocating for the rights and interests of persons with disabilities. A short description of each organization appears in the Addendum.

These organizations and their members have direct experience with the state sponsored discriminatory activities and attitudes which informed Congress in its drafting of the ADA. They have a direct stake in the interpretation of the Act, including both its scope and its constitutionality. Finally, these organizations and their members include families with loved ones in prison who would be immediately and negatively affected by the limitations proposed by the petitioners in this case.

¹No Counsel for a party authored this brief in whole or in part. no person or entity other than the *amici curiae*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Throughout the history of our Nation, individuals with disabilities have been subjected to a regime of segregation, invidious discrimination, and exclusion. That regime is reflected in a tapestry of state laws, policies, and practices. It reveals a legacy of state sponsored and codified prejudice grounded in stereotypes and inaccurate perceptions of the abilities and limitations of many of our citizens. Despite piecemeal legislative efforts to eradicate these deeply-rooted patterns of discrimination over five decades, the regime has remained pervasive and wide-spread. Congress sought to redress this national problem with the passage of the ADA.

Congress, the voice of the States speaking in unison on issues that affect the Nation, is a body of duly elected representatives of the people. Congress passed the Americans with Disabilities Act to move existing Constitutional protections within the grasp of individuals with disabilities and remedy the effects of the invidious discrimination that had become their legacy. In plain language, Congress intended that the Act reach any State or local government department or agency, including the Pennsylvania Department of Corrections.

Amici curiae recognize that State prisons are penal institutions, the responsibility for and management of which are peculiarly within the province of the legislative and executive branches of the respective States, and do not suggest otherwise in its argument. The administrators of State prisons must overcome Herculean obstacles as they seek to maintain order and discipline, secure their institutions, and rehabilitate, to the extent possible, the inmates placed in their custody. *Amici* in no way seek to minimize or reassign those task nor do they portend to seek special privileges

for persons with disabilities.

Amici merely ask that this Court consider only that Ronald Yeskey asked to participate in a program established and implemented by administrators of the Pennsylvania Department of Corrections to the same extent as his similarly situated non-disabled peers. Ronald Yeskey was not allowed to participate solely on the basis of his disability. Petitioners' denial is consistent with reports that persons with disabilities receive longer and harsher sentences, serve more of their sentences than do their non-disabled peers and are more unlikely to receive any habilitation while incarcerated.²

ARGUMENT

I. PETITIONERS' ATTEMPT TO EXEMPT PRISONS FROM THE ADA IS INCONSISTENT WITH THE PRIMARY PURPOSE OF CONGRESS TO CREATE A COMPREHENSIVE STATUTE THAT WOULD ROOT OUT UNCONSTITUTIONAL DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES IN EVERY ASPECT OF AMERICAN SOCIETY.

The ADA was the culmination of a prolonged legislative initiative begun in earnest more than twenty years earlier with the passage of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination in any program or activity -- including programs operated by State agencies -- that receives Federal financial assistance.³ Congress intended the Rehabilitation

²See, e.g., J. Ellis & R. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L.Rev. 414, 479-480 (1985).

³In addition to the Rehabilitation Act, the ADA was built on the foundation established by Congress through the enactment of numerous other statutes in the two decades preceding the ADA that prohibited discrimination against

Act to cure the Nation's "failure to recognize the intrinsic rights of the handicapped." Timothy M. Cook, *The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 Loy. L.A. L. Rev. 1471, 1478 (1987). Three years of hearings prior to the enactment of § 504 made clear to the lawmakers that "although accessibility would entail burdens, eliminating the evil of exclusion would economically and morally outweigh the costs." *Id.* at 1478-79.

Despite the intent behind the Rehabilitation Act to extend protection to persons with disabilities, discrimination persisted. After extensive consideration of continuing and pervasive discrimination faced by people with disabilities, Congress came to the conclusion that existing federal and state laws were not adequate, that its piecemeal approach to legislating in different

people with disabilities. These included: the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1485 (1970), enacted despite this Court's opining that "[Education] is perhaps the most important function of state and local governments...required in the performance of our most basic public responsibilities" *Brown v. Bd of Educ.*, 347 U.S. 483, 493 (1954), and in the wake of judicial decisions holding that the exclusion of children with disabilities from public schools violated the Equal Protection Clause; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6083 (1994) (amending Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963), enacted because Congress found that government funded agencies "tend to overlook or exclude persons with developmental disabilities in their planning and delivery of services," § 6000(a)(4), and which required States to assure protection of civil rights and the provision of treatment, services, and habilitation; the Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3631 (1988), that prohibits discrimination on the basis of disability in the sale or rental of housing; the Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (1968), that requires federally funded or leased buildings to be accessible; the Urban Mass Transportation Act, 49 U.S.C. §§ 1612-1625 (1970) (repealed July 5, 1994), requiring eligible jurisdictions to provide accessibility plans for mass transportation; and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1980), which gives discretionary authority to the U.S. Attorney General to bring an action against "any State or political subdivision of a State official, employee, or agent thereof, or other person acting on behalf of a State for depriving institutionalized persons of rights secured under the constitution or federal laws." 42 U.S.C. § 1997a(a).

substantive areas was ineffective and confusing, and that comprehensive federal legislation was imperative to protect all people with disabilities against all forms of discrimination, whether public or private. H.R. Rep. No. 101-485, pt. 2, at 47-48, *reprinted in*, 1990 U.S.C.C.A.N. at 330.⁴ As Attorney General Richard Thornburgh, speaking on behalf of President Bush, told Congress:

One of its (the ADA's) most impressive strengths is its comprehensive character. Over the last 20 years civil rights laws protecting disabled persons have been enacted in a piecemeal fashion. Thus, existing federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protection.

H.R. Rep. No. 101-485, pt. 2, at 48; S. Rep. No. 101-116, at 19 (1989).⁵

The need for additional comprehensive Federal legislation was also recognized by State officials who testified about the ADA before Congressional committees. For example, the Committee Reports cite the testimony of Neil Hartigan, the Attorney General from Illinois, who stated:

⁴*See City of Cleburne, Texas v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) (six years prior to these hearings, this Court recognized the need for Federal legislative protections for persons with disabilities because of the historical failure of states to ensure individual rights).

⁵The Committee Reports also point out that the need for omnibus legislation was one of the major recommendations made by the National Council on Disability in its two reports to Congress, and was recommended by the President's Commission on the HIV Epidemic, as well. H.R. Rep. 101-485, pt. 2, at 48; S. Rep. No. 101-116, at 19.

Under the current federal law, the Rehabilitation Act's non-discrimination requirements are tied to the receipt of federal financial assistance. Unfortunately, what this translates to is total confusion for the disability community and the inability to expect consistent treatment. Where there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently from those who don't have disabilities.

S. Rep. No. 101-116, at 12.⁶ Congress' intent was to ensure that all decisions based on disability, public or private, were guided by facts, not myths, fears, and stereotypes. As Senator Dole stated:

We have included in this legislation all people with all disabilities, no matter how misunderstood, because that is what this bill is about--replacing misunderstanding with understanding.

136 Cong. Rec. S 9695 (July 13, 1990) (statement of Sen. Dole).

⁶Further evidence of State support for the ADA came from the Chairman of the President's Committee on the Employment of Persons with Disabilities who informed Congress that:

the fifty State Governors' Committees, with whom the President's Committee works, report that existing State laws do not adequately counter such acts of discrimination." S. Rep. No. 101-116, at 18.

Congress also had evidence that the States would not eliminate discrimination on their own. The Committee Reports cite the testimony of Admiral James Watson, Chairperson of the President's Commission on the HIV Epidemic, who stated:

[E]nough time has, in my opinion, been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action. *Id.*

A. States Have Historically Sponsored, Supported, and Enacted Policies Which Purposely Discriminate Against Persons With Disabilities.

Congressional consideration of the ADA took place against an historical backdrop of longstanding State sponsored discrimination against people with disabilities that can only be called "grotesque." *Cleburne*, 473 U.S. at 438. This discrimination arose not only from deep-seated prejudice against individuals with disabilities, but from archaic laws that reflect inaccurate stereotypes about disabilities. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). For example, during the early part of the 20th century, practically every state adopted a policy of segregating and isolating individuals with disabilities for life in massive custodial institutions. *Cleburne*, 473 U.S. at 461-462 (Marshall, J., concurring and dissenting in part). The States actively inculcated fear of mentally retarded persons and undertook major outreach efforts to identify and remove them from the community. The State of Pennsylvania excluded mentally retarded children from public schools by enacting laws which relieved the State Board of Education "from any obligation to educate a child whom a public school psychologist certifies as uneducable and untrainable." *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 282 (E.D. Pa. 1972).

The virulence and bigotry directed by the States towards people with disabilities "rivalled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 461, (Marshall, J., concurring and dissenting in part). People with disabilities were blamed for all of society's worst evils, from crime to poverty. The goal was not merely to separate them from the community, but to prevent them from reproducing so as to literally "nearly extinguish their race." *Id.* at 462 (citing A. Moore, *The Feeble-Minded in*

New York 3 (1911)). "To assure this end, twenty-nine states enacted compulsory eugenic sterilization laws between 1907 and 1931." *Id.* at 463 (citing J. Landman, *Human Sterilization* 302-303 (1932)). State legislation also prohibited people with mental retardation from marrying. Similar laws were directed at individuals with epilepsy and mental illness. Most states categorically disqualified "idiots" and other persons labeled as disabled from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. *Id.* at 464.

Although one might have hoped that archaic state laws and practices that blatantly discriminated against people with disabilities would have disappeared by the 1980's, this was not the reality confronting Congress as it began to draft the ADA. For example, even in 1983 fifteen states still had laws authorizing the compulsory sterilization of individuals with mental illness or retardation, and at least four states authorized the sterilization of persons with epilepsy.⁷ Thousands of individuals with disabilities remained unnecessarily segregated in large institutions where abuse by staff, and other dangerous physical conditions, were common. *U.S. Commission Report* at 33-35. Moreover, people with disabilities continued to be denied basic civil rights that other citizens take for granted. For example, many states unjustifiably restricted the right of persons with disabilities to vote, to hold public office, or to obtain a license to hunt or fish. *Id.* at 40. Many states also

⁷*U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Disabilities* at 37 (1983) [hereinafter *U.S. Commission Report*]. As petitioners recognize the *U.S. Commission Report* was heavily relied upon by Congress in assessing the nature and extent of the discrimination that still existed against persons with disabilities. Petitioners' Brief at 16-17. The Report was entered into testimony before House and Senate subcommittees and was quoted in the Committee Reports of the Senate Comm. on Labor and Human Relations, S.Rep. No. 101-116, at 8 (1989) and the House Comm. on Educ. and Labor, H.R. Rep. No. 101-485, pt. 2, at 28, 31 (1990).

prohibited individuals with disabilities from marrying or entering into contracts. *Id.* Indeed, several states continued to make marriages of the mentally retarded a criminal offense. *Cleburne*, 473 U.S. at 463. Many states mandated that parents with disabilities surrender their children through unjustified proceedings to terminate parental rights. *U.S. Commission Report* at 40, 167. Governmental discrimination was pervasive throughout the criminal justice system.⁸ *Id.* at 168.

B. *Congress Carefully Considered This History of Unconstitutional Discrimination When It Drafted the ADA.*

Before enacting the ADA, Congress carefully explored the problems of discrimination against people with disabilities. It conducted numerous hearings on the ADA and considered testimony by hundreds of people about discrimination across the entire spectrum of governmental functions, including education, voting, public health, transportation, communication, judicial, and law enforcement such as police, courts, and jails. In its extensive deliberations on the ADA,⁹ Congress also reviewed authoritative governmental, public health, and census reports which studied the

⁸Massachusetts, for example, categorically prohibited mentally disabled patients from seeking parole, even though the courts had long since declared that such laws violate the Equal Protection Clause. See *Mass. Gen. Laws* ch. 127, § 133A. See also *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D. W.Va. 1976); *People v. Agnew*, 68 Misc.2d 128, 133-134; 326 N.Y.S.2d 477, N.Y. Sup. Ct. (1971).

⁹The Senate Committee on Labor and Human Resources and the Senate Subcommittee on the Handicapped held five hearings on the bill. On September 7, 1989, the bill passed the Senate with overwhelming support by a vote of 76 to 8. In the House, over twenty hearings were held before four House committees' subcommittees. The House and Senate Conference Committee convened twice. The conference bill passed by an overwhelming majority in both the House (by a vote of 377 to 28) and the Senate (by a vote of 91 to 6). The ADA was signed by President Bush on July 26, 1990.

status of people with disabilities, all of which concluded that comprehensive civil rights legislation was necessary to combat pervasive discrimination against people with disabilities.¹⁰

Contrary to petitioners' claim, however, the report does not focus simply on the warehousing of disabled people in segregated institutions. It also describes discrimination in more than 20 broad categories of state provided or supported programs or services, and refers specifically to prisons and jails as settings for discrimination. The report explicitly identifies eight distinct types of discrimination by the criminal justice system, including:

Disproportionate number of mentally retarded people in prisons and juvenile facilities; Improper handling and

¹⁰Both the House and the Senate cited seven substantive studies or reports to support the conclusion that discrimination against the disabled is a serious and pervasive problem. S.Rep. No. 101-116, at 6; H.R.Rep. No. 101-485, pt. 2, at 28 (both citing National Council on the Handicapped: On the Threshold of Independence (Jan.1988) (updating the legislative changes recommended in *Toward Independence*)); Report of the President's Commission on the HIV Epidemic (June 1988) (reviewing the medical, financial, ethical, policy, and legal issues that affect those afflicted with HIV); Louis Harris and Associates, *Employing The ICD* (International Center for the Disabled) Survey II: Disabled Americans (1987) (surveying 210 top managers, 301 equal employment managers, 210 department heads and line managers, and 200 top managers in companies employing 10-49 people); Louis Harris and Associates, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (March 1986) (surveying 1000 disabled persons); National Council on the Handicapped, *Toward Independence* (Feb.1986) (reviewing different laws and programs that affect disabled persons and offering recommendations for legislative changes); U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (Sept.1983) (reporting on, among other things, the history, nature, and extent of discrimination against the disabled); From ADA to Empowerment: The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities (Oct. 12, 1990) (compiling findings and recommendations following the formation of a Task Force, which conducted 14 Washington, D.C., teleconference meetings with participants from across the country, held 63 public forums in the 50 states and some territories, held other meetings involving 25,000 participants, testified in congressional hearings, met with legislative and executive staff members, met with the President, Vice President and various Cabinet members, and met with opponents of the ADA).

communication with handicapped persons by law enforcement personnel; Insufficient availability of interpreters; Inadequate treatment and rehabilitation programs in penal and juvenile facilities; Inability to deal with physically handicapped accused persons and convicts, (e.g. accessible jail cells and toilet facilities); and, abuse of handicapped persons by other inmates.

U.S. Commission Report at 168.¹¹

Title II was the least dramatic of the ADA's additions to existing law; its primary purpose was to extend to all State entities the non-discrimination requirements already applicable to most governmental agencies under § 504 of the Rehabilitation Act.¹² Nonetheless, as petitioners concede, Congress heard a wealth of

¹¹The legislative history of the Civil Rights Restoration Act of 1987, enacted to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), shows that Congress understood that the Rehabilitation Act applies to prisons. The Senate Report explained the need for action as follows:

Clear violations of federal law go uncorrected while students lose valuable educational benefits that can rarely be recovered and employees lose jobs or job opportunities. Prolonged debate takes place over what constitutes a "program or activity" under the civil rights law, while the universities, schools, and correctional facilities receive millions of federal dollars.

S. Rep. No. 64, 100th Cong., 1st Sess. 24 (1987) (emphasis supplied).

¹²See M.C. Weber, *Disability Discrimination By State And Local Government: The Relationship Between Section 504 Of The Rehabilitation Act and Title II of the Americans With Disabilities Act*, 36 Wm. & Mary L. Rev. 1089, 1117 (1995) (suggesting that Title II's legislative history is, in reality, a form of subsequent legislative history for section 504). Further, the ADA itself provides that "[n]othing in the ADA shall be construed to provide a lesser standard than the standard applied under Title V of the Rehabilitation Act." 42 U.S.C. § 12201(a). The legislative history of Title II also displays strong support for § 504 and its regulations. See, H.R. Rep. No. 101-485, pt. 1, at 26.

testimony from a wide range of people, including "mothers, fathers, and children; from students and workers", who all "spoke eloquently about the daily problems they encounter in society as a result of their disabilities." Petitioners' Brief at 13. Congress heard powerful accounts of discrimination by many types of public entities, including the courts, schools, voting, police and fire departments, mental retardation institutions, as well as about prisons and jails.

For example, the House Reports describe discrimination against people with epilepsy in the criminal justice system:

In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. Such discriminatory treatment based on disability can be avoided by proper training.¹³

Similarly, Belinda Mason, a board member of the National Association of People with AIDS, testified:

A man passing through a central Kentucky town was stopped for drunk driving. After he told the arresting officers that he had AIDS, the man's car was driven to a parking lot of the jail. Instead of putting the man in jail,

¹³H.R. Rep. No. 101-485(III), at 50, reprinted in 1990 U.S.C.C.A.N. vol. 4, 473.

the officers locked him inside his car to spend the night. The car was eventually surrounded by sightseers, staring and pointing at the man.

A woman in another part of Kentucky had managed a school cafeteria for a number of years. Her adult son, who was living in California, became ill with AIDS. The woman went to California to bring her son home so she could care for him. But when she returned, she was abruptly fired from her job.¹⁴

Justin Dart, the Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, related the following account, which had been told to the Task Force by a service provider to hearing impaired individuals in Illinois:

We have clients who have been arrested and held in jail over night without ever knowing their rights nor what they are being held for. We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?¹⁵

Cindy Miller, a Massachusetts rehabilitation counselor, testified about the abominable treatment of individuals with disabilities in state institutions and by police across the country:

¹⁴*Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Senate Subcomm. on the Handicapped of the Comm on Labor and Human Relations, 100th Cong., 2nd Sess. (1988).*

¹⁵*Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Relations and the Subcomm. on the Handicapped, 101st. Cong., 1st Sess. (1989).*

As a rehabilitation counselor, I have seen these institutions. The smell of human waste and detergent has stuck in my throat. I have looked into the vegetative eyes of its inmates in their sterile environments. . . . I have witnessed their jailers rationalize taking away their wheelchairs as a form of "punishment" -- as if that is different then punishing prisoners by breaking their legs. I have witnessed their jailers taking away their food as form of "punishment" -- as if that is different than starvation. I have witnessed their jailers talk about them in the third person and leave them naked to the public -- as if this doesn't strip them of their human dignity. We have laws to protect animals from these conditions, while Americans with disabilities continue to suffer.

Crimes against Americans with disabilities is an ignored epidemic in America. The Police do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims. I have given up on police protection because of their attitude that Americans with disabilities are natural victims. Never was this so graphic as when an officer pointed his gun at my head, cocked it, and unknowingly to me pulled the trigger on an empty barrel because he thought it would be "funny" since I have quadraparesis and couldn't flee or fight.¹⁶

Other witnesses testified about government officials who deliberately excluded people with disabilities from the court

¹⁶*Americans with Disabilities Act of 1988: Hearings on H.R. 4498 Before the House Subcomm. on Select Education of the Comm. on Education and Labor, 100th Cong., 2nd Sess. (1988).*

system, voting, and jury service.¹⁷ For example, Emeka Nwojke, a Massachusetts resident, testified about his experience in court, where he went to pursue a complaint that he had been unlawfully discriminated against because of his disability:

First of all, I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who happened to be a policeman. He told me there was an entrance at the back door for the handicapped people. . . . I readily agreed and I went to the back door. I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. So, I was at the back door for an hour waiting for somebody to come back so I could call for help. This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in.¹⁸

Based on its exhaustive and meticulous consideration of this and similar testimony and reports, Congress made nine general Findings about the widespread discrimination against persons with disabilities that existed in virtually every aspect of society.¹⁹ These

¹⁷*Id.* Testimony of Nancy Turkin, executive director of the Center for Independent Living.

¹⁸ *Id.* Testimony of Nancy Husted-Jensen, Chairman of the Governor's Commission on the Handicapped in Rhode Island. She recanted the Constitutional deprivation experienced by persons with disabilities who tried to vote. The Board of Election Commission's director told her that even though they were registered, voters with disabilities had been turned away at the polling place for "not looking competent."

¹⁹ These findings include, *inter alia*, that 43,000,000 Americans with physical or mental disabilities have been isolated, segregated and discriminated against in such critical areas as employment, public accommodations,

Findings provide the rationale for the purpose, scope, and remedial standards of the ADA. They represent the factual and legal predicate for Congress' actions. They more than support Congress' conclusion that it was necessary to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(a). Not a single one of the Congressional Findings is incompatible or irrelevant to prisons.²⁰

C. The Broad Scope of Title II of the ADA Was Designed to Address the History of Discrimination and Exclusion of Persons With Disabilities by States and State Entities.

The ADA's universal mandate applies to every agency and official of state government.²¹ There is no exception for prisons or

education, institutionalization, and access to public services; individuals who have been discriminated against on the basis of disability often have no legal recourse to redress discrimination that has tended to relegate them to lesser services, programs, activities, benefits, jobs, or other opportunities; the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and the continuing existence of unfair and unnecessary discrimination and prejudice denies them the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity. 42 U.S.C. § 12101(a).

²⁰ Contrary to petitioners' argument, the term "public services," as used in Finding 3 and in the heading of Title II, is not limited to services available to the general public. By definition, Title II, encompasses all the programs and services of a "public entity," many of which are not open to the general public. Further, the phrase "our free society" in Finding 9 is a reference to America's political tradition and values, and was hardly meant to draw a distinction between people in prison and those in the community.

²¹ Title II prohibits discrimination in the "services, programs, or activities of a public entity," and defines a "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States local government." 42 U.S.C. §§ 12131(1)(B), 12132 (1990).

any other unit of state government. In fact, Congress deliberately chose not to list all of the different state functions covered by Title II in order to ensure that there would be no gaps in its universal coverage of all units of state and local government.²²

There is no merit to petitioners' contention that the "clear statement rule," articulated by the Court in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), removes state prisons from the scope of Title II.²³ Even if the clear statement doctrine is relevant to the interpretation of a federal statute that impinges on the operations of a state prison, it only applies if the statute is ambiguous. *Salinas v. United States*, 118 S.Ct. 469, 475 (1997); *Hilton v. South Carolina Public Rys. Comm.*, 502 U.S. 197, 205-06 (1991); *Gregory*, 501 U.S. at 467. It does not permit the courts to take seriously every far-fetched interpretation of a statute offered by litigants. As the Court explained in *Salinas*:

A statute can be unambiguous without addressing every interpretative theory offered by a party. It need only be "plain to anyone reading the Act" that the statute applies to

²²See H.R. 101-485, 101st Cong., 2d Sess., pt. 2, at 84.

²³It is doubtful whether the "clear statement rule" has any applicability at all to Title II's regulation of state prisons. In *Gregory*, the Court justified its application of the rule, previously invoked only to assess a purported abrogation of Eleventh Amendment immunity, because the federal statute at issue impinged on a state constitutional provision governing the qualifications of state judges, a subject which "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. As Judge Posner stated in *Crawford v. Indiana Dep't. of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997), *petition for cert. filed*, (Dec. 19, 1997):

Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, but the mere provision of public services, such as schools and prisons, is not within that inner core.

the conduct at issue.

118 S.Ct. at 475 (quoting *Gregory*, 501 U.S. at 467). No matter how much the Federal statute may intrude on a traditional state function, a court "cannot press statutory construction to the point of disingenuous evasion." *Id.* (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, n.9 (1996)). Otherwise, the clear statement rule, "while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *United States v. Albertini*, 472 U.S. 675, 680 (1985).

The clear statement rule does not warrant a departure from the terms of Title II to exclude prisoners from its protection. No ordinary reader could plausibly conclude that the definition of "public entity" excludes a state department of corrections, or any other state entity for that matter.²⁴ When it uses language that is plainly comprehensive, Congress does not have to list by name each particular state function it intends to regulate.²⁵ *Gregory*, 501 U.S. at 467. As Judge Posner stated:

We doubt, moreover, that Congress could speak much more clearly than it did when it made the Act expressly applicable to all public entities and defined the term "public entity" to include every possible agency of state or local government.

²⁴Title II is not *per se* ambiguous just because some courts have strained to find ambiguity where none exists.

²⁵By contrast, the statute at issue in *Gregory* (the ADEA) was "sweeping on its face, and our task was to construe an exception from that otherwise broad coverage." *Evans v. United States*, 504 U.S. 255, 294, n.8 (1992) (Thomas J., dissenting). The court invoked the clear statement rule only because the exception — for "an appointee on the policy making level" — was susceptible of two plausible constructions. *Gregory*, 501 U.S. at 456.

Crawford, 115 F.3d at 485.

Furthermore, the ADA expressly requires that the Act be construed to provide at least the protections available under the standards and regulations of the Rehabilitation Act. In its deliberations on the ADA, Congress took great pains to study § 504 of the Rehabilitation Act to determine its inadequacies and make changes where it thought appropriate.²⁶ By the time Congress enacted the ADA, every court considering the question had ruled that the Rehabilitation Act applied to prisons,²⁷ and the Department of Justice had promulgated regulations setting forth the requirements imposed by the Act in prison.²⁸ This Court had also

²⁶The report of the Committee on Energy and Commerce, for example, in explaining the origins of Title II, stated:

Seventeen years of experience with section 504 - in the development and issuance of regulations, guidelines, and standards, in the implementation of those requirements, and in the interpretation of the law - have demonstrated the need for further legislative action in this area.

H.R. 104-485, 101 Cong., 2d Sess., pt. 4, at 24.

²⁷*Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988); *Journey v. Vitek*, 685 F.2d 239, 242 (8th Cir. 1982); *Baker v. Seabold*, No. 87-5486, 1987 WL 38691 (6th Cir. Oct. 15, 1987); *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D. W.Va. 1976). See also *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (vacating as moot judgment of district court that prison officials violated Rehabilitation Act).

²⁸See 28 C.F.R. § 42.540(h) (program includes a "department of corrections"); 28 C.F.R. § 39.170(d)(ii) (setting forth procedure for prisoner to file a complaint). Significantly, this regulation was submitted to Congress during its consideration of the ADA. Further, the ADA requires the Attorney General to promulgate regulations governing "program accessibility, existing facilities" that are consistent with the Rehabilitation Act regulations set forth in 28 C.F.R. Part 39, 42 U.S.C. § 12134(b). In turn, 28 C.F.R. Part 39.150, which governs "program accessibility, existing facilities", mandates that state agencies covered by the Rehabilitation Act "meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. §§ 4151-4157), and any regulations implementing it." At the time the ADA was passed, the regulations promulgated under the Architectural Barriers

repeatedly emphasized that the federal regulations are "an important source of guidance on the meaning of § 504." *School Bd. of Nassau County*, 480 U.S. at 279 (quoting *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985)). There is nothing in either the text or legislative history of the ADA to suggest that Congress disapproved of the application of the Rehabilitation Act to prisons, or that it wished the ADA to be interpreted differently.

Application of Title II to persons in State prisons is consistent with other civil rights legislation passed by Congress, such as the Civil Rights Institutionalized Persons Act (CRIPA), which empowers the U.S. Attorney General to initiate civil actions to protect the constitutional and statutory rights of persons residing in institutions, including correctional facilities. 42 U.S.C. 1997 (1)(B)(ii). Although Congress amended CRIPA in 1997 to limit prisoner litigation, it could have, but did not seek to eliminate the ADA from the scope of its protection. The broad language of Title II also parallels that in other federal anti-discrimination statutes, such as Title VI and Title IX of the Civil Rights Act and the Individuals with Disabilities Education Act, that have been applied to correctional facilities. See *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) (Title IX); *Franklin v. District of Columbia*, 960 F.Supp. 394, 432 (D.C. D.C. 1997) (Title VI); *Alexander S. v. Boyd*, 876 F. Supp. 773 (D. S.C. 1995) (IDEA).

D. Title II Does Not Permit Exclusions or Exceptions for Certain State Entities, Services, Functions, or Locations

The petitioners contend that because prison management is a

Act included the Uniform Federal Accessibility Standards accessibility guidelines, then set forth in 24 C.F.R. Part 40, App. A (1989), which, at § 4.1.4(9)(c), explicitly refer to "detention or correctional facilities."

core function traditionally left to the discretion of the States, the Court should invent an exception from Title II specifically for this State program. Although there is no question that prison management is one of a state's most significant responsibilities, it is no more vital than any other important government function, such as education, public health, voting, child protection services, or the courts, all of which are routinely understood to be covered by both the ADA and the Rehabilitation Act.²⁹ The interpretative strategy urged by the petitioners lacks rational boundaries and could eviscerate Title II if it were applied to remove other important State programs and services from the scope of the ADA.

As this Court recognized in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 539 (1985), it is "difficult, if not impossible, to identify an organizing principle" to distinguish those federal statutes that "trench on traditional governmental functions" from those that do not. Petitioners' approach could therefore threaten to exclude significant segments of State and local governmental activities from the reach of other federal statutes, such as Title VI, Title VII and Title IX of the Civil Rights Act of 1964. This would require the reversal of an enormous body of settled law, since federal courts have regularly applied civil rights statutes that are phrased in general terms to a variety of governmental activities that could be characterized as "core state functions." See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *EEOC v. Wyoming*, 460 U.S. 226 (1983).

²⁹See, e.g., *Crowder v. Kitagwa*, 81 F.3d at 1480, 1485 (9th Cir. 1996) (state public health and safety legislation); *Galloway v. Superior Court of Dist. of Columbia*, 816 F. Supp. 12, 15 (D.C. 1993) (courts and jurors); *Eric L. v. Bird*, 848 F.Supp. 303 (D. N.H. 1994) (state foster care services). This Court has also concluded that § 504 of the Rehabilitation Act applies to public schools and public health, *School Bd. of Nassau County*, 480 U.S. 273 and medical care, *Alexander*, 469 U.S. 287.

Like prisons, a number of essential State entities are not specifically mentioned by Title II, do not always provide services to people who participate voluntarily, and are not necessarily open to the general public. For example, every day thousands of individuals with disabilities have business in the state courts — both civil and criminal — as parties, witnesses, jurors, employees, or citizens observing the proceedings. Yet Title II makes no explicit mention of the courts, and they are not expressly referred to in any of the Congressional Findings.³⁰ Further, many psychiatric and forensic facilities provide mental health and restoration services to committed patients in locked settings that are closed to the public. The same is true of developmental centers for persons with retardation that provide custodial and rehabilitation services to involuntarily confined residents. Many other government programs, such as State operated group homes, public health hospitals, child protection services, and numerous government offices, are well within the scope and purpose of Title II even though not open to the public in any meaningful sense.

Even within the general category of law enforcement, it might be difficult to carve out an exemption limited to state prisons. Other state law enforcement programs, such as forensic hospitals, juvenile delinquency programs, community corrections, treatment centers for sex offenders who have completed their sentences, probation, parole, and jails could arguably be

³⁰Many other examples of core state functions that are not explicitly listed in either Title II or in the Congressional Findings demonstrate the fallacy of petitioners' tortured reading of Title II. Could a fire department allow an unwanted group home for people with mental retardation to burn to the ground without risking a lawsuit under the ADA? Are police free to ignore crimes committed against the disabled? Could a state legislature bar people with cerebral palsy from its galleries because it thought them too disturbing to look at? None of these state entities are mentioned by name in Title II.

excluded.³¹ Whether the ADA was applicable or not could depend on whether the program at issue was run by the department of correction or a separate state agency in that particular state. For example, Congress clearly intended that facilities like Atascadero State Hospital — a maximum security forensic institution operated by the California Department of Mental Health — be covered by the Rehabilitation Act and the ADA.³² Yet in many states identical facilities are run by the Department of Correction even though they can hold patients who have not committed any crime.³³ Petitioners' concession that certain activities within the prison, such as visiting rooms and administrative buildings, are properly within the reach of Title II further illustrates the difficulties and arbitrariness of the effort to write exemptions into Title II that have no basis in its textual language.

There is nothing "absurd" or at odds with the purposes of the ADA to extend its protections to prisoners. See *Crawford*, 115 F.3d at 485-487. Just as the prohibition of discrimination on the basis of race applies to the segregation of prisoners, *Lee v. Washington*, 390 U.S. 333 (1968), it is reasonable to proscribe discrimination on the basis of disability in the programs available in

³¹Although jails primarily hold people who are awaiting trial and presumed innocent, forty-five states use jails to detain people with mental illness who are waiting for a psychiatric evaluation or mental health services in the community, and have not even been charged with a crime. See Joint Report of the National Alliance for the Mentally Ill and Public Citizen's Health Group, *Criminalizing the Seriously Mentally Ill: The Abuse of Jails as Mental Hospitals* (1992).

³²Congress responded to this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), by amending the Rehabilitation Act to ensure that discrimination of the sort alleged in that case would be covered. Moreover, the ADA includes a waiver of sovereign immunity, 42 U.S.C., § 12202, that was expressly designed to comply with standards set forth in *Atascadero*. S.Rep. No. 101-116, 101st Cong., 1st Sess. at 86.

³³See, e.g., *Doe v. Gaughan*, 808 F.2d 871 (1st Cir. 1986) (describing Bridgewater State Hospital in Massachusetts).

state correctional facilities. Prisoners suffer from the same wide range of disabilities experienced by individuals with disabilities in the community. Some use wheelchairs, some are blind, mentally retarded, or deaf, and others suffer from AIDS, epilepsy, mental illness, diabetes, or cerebral palsy. Within the prison environment, they are vulnerable to identical, if not worse, discrimination and oppression than that faced by people with disabilities in the community or other institutional settings.³⁴ This may include intentional mistreatment resulting from bias and stereotypes, as well as the denial of the opportunity to participate in programs, services, and activities within the prison. For example, a deaf prisoner who cannot communicate with the prison doctor about a medical issue is in exactly the same desperate position as a deaf person in a psychiatric institution with a similar need. Both are at a considerable disadvantage compared to a deaf person in the community who has the option of seeking another doctor. Similarly, a prisoner who cannot access rehabilitative programs because he uses a wheelchair, and therefore cannot earn "good time" or satisfy the prerequisites of the parole board, suffers the same harm as a person with the identical disability who remains unnecessarily institutionalized because she cannot attend vocational programs in a mental hospital.

Application of Title II of the ADA to prisons is no more complex nor no less critical than it is in any other institution where people are held involuntarily and virtually every aspect of their lives is controlled. Most of the problems facing individuals with disabilities have exactly the same solutions in prison as in the

³⁴Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49 (1996). See also *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "you crippled bastard you should be dead").

community: make buildings and bathrooms accessible, provide interpreters and auxiliary communication devices, and ensure that persons with disabilities are not arbitrarily excluded from programs or services by eligibility requirements produced by erroneous stereotypes.³⁵ Nor are prisons unique in confronting conflicts between competing goals in the management of difficult people. Similar conflicts arise whether the institution is a conventional mental hospital where patients may be both violent and mentally ill, or an institution for people with mental retardation where fiscal constraints make it difficult to satisfy the treatment and habilitation needs of all residents. Even in a state university, the administration faces complicated operational and budgetary issues that affect every aspect of the daily lives of the students, staff, and faculty.

The ADA does not require prison administrators, anymore than any other public official, to do anything that is unreasonable or unduly burdensome or that would fundamentally alter its programs. What is "reasonable" will depend on the circumstances, and in the prison context, important management concerns such as security are "highly relevant to determining the feasibility of the accommodations disabled prisoners need in order to have access to desired programs and services." *Crawford*, 115 F.3d at 487.³⁶

³⁵Many of the accommodations required by the ADA are also mandated by the Constitution. See, e.g., *LaFaut v. Smith*, 834 F.2d at 394 (finding unconstitutional, in an opinion written by retired Supreme Court Justice Powell, the failure to provide paraplegic inmate with handicap toilet in cell and work area); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1346 (S.D.Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (mentally retarded prisoners facing disciplinary charges must be provided with "counsel substitute" under *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), even though non-disabled inmates have no such right).

³⁶Courts have consistently applied Title I of the ADA to employment of prison guards by taking into account prison management and security concerns. See, e.g., *Allison v. Dep't of Corrections*, 94 F.3d 494 (8th Cir. 1996).

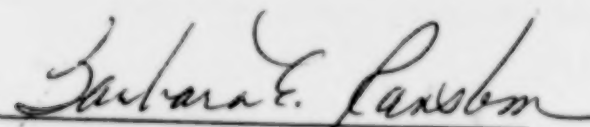
Thus, the ADA will no more wreak havoc within the prison system than it has in any other state program.

CONCLUSION

Amici curiae ask this Court to focus on the harm that occurred when the Pennsylvania department of corrections denied Ronald Yeskey, a person with a disability, solely on the basis of his disability, equal access to a program authorized by the General Assembly. The Legislature's charge to the Department of Corrections was to implement the State Motivational Boot Camp program. The Legislature authorized a program to rehabilitate youthful offenders by providing them, *inter alia*, continuing education, vocational training and pre-release counseling as a hedge against reincarceration. Ronald Yeskey's participation in a program, authorized by legislation and implemented by the department, does not impinge on the State's authority to manage its correctional facilities.

Petitioners have taken a hard line in pressing their asserted right to determine who can and cannot participate in the program. Petitioners have made no claim that Mr. Yeskey was not in all respects, save his disability, an appropriate candidate for the program. To its discredit, petitioners did and continues to seek relief from the judiciary to continue the unequal treatment that the States spoke with a single voice to eradicate.

Public Interest Law Center of Philadelphia

BY: 

Barbara E. Ransom, Esquire

Judith Gran, Esquire*

125 S. 9th Street

Suite 700

Philadelphia, Pa. 19107

(215) 627-7100

Counsel for The *Amici Curiae*

* Counsel of Record

ADDENDUM

DESCRIPTIONS OF AMICI CURIAE

The National Advisory Group for Justice (NAG) is a Project of National Significance funded by the Administration for Developmental Disabilities, U.S. Department of Health and Human Services to assist that federal agency in fulfilling its mandate to prevent discrimination against persons with developmental disabilities. Persons with developmental disabilities, whether accused of, victims of, or witnesses to crimes, are denied full access to the services, supports and programs in the criminal justice system to the same degree as their non-disabled peers. The NAG was established, therefore, to examine nationwide legal trends in the criminal justice system as they affect persons with developmental disabilities and directs its resources to the enforcement of the Americans with Disabilities Act. The NAG seeks reasonable accommodations for persons with disabilities throughout the criminal justice system.

The grantee organization, the Public Interest Law Center of Philadelphia (PILCOP), is a non-profit law firm established in 1974 which has responded on a national level to the needs of persons with disabilities. For more than 25 years, PILCOP has maintained close and productive working relationships with disability rights organizations and is well-known for its mission. With Self Advocates Becoming Empowered (SABE), a national, non-profit, grassroots organization of Self-advocates, PILCOP implements the NAG's programs.

The American Foundation for the Blind's (AFB) mission is to enable persons who are blind or visually impaired to achieve equality of access and opportunity that will ensure freedom of choice in their lives. AFB accomplishes this mission by taking a national leadership role in the development and implementation of public policy and legislation, informational and educational

programs, and quality services.

The Disability Rights Council of Greater Washington (DRC), established in 1992 as a regional advocacy organization, addresses systemic discrimination against people with disabilities in every aspect of society. The DRC's goals are to promote, secure and protect the full participation of people with disabilities in the community, which the DRC believes will strengthen society as a whole.

The National Alliance for the Mentally Ill (NAMI) is a national organization of families of people with severe mental illnesses and people with severe mental illnesses themselves. Comprised of 172,000 members and more than 1,100 affiliates nationwide, NAMI's goals are to educate the public about severe mental illnesses such as schizophrenia, manic-depressive illness and major depression as treatable brain disorders, and to advocate for the advancement of treatment services for people with these disorders. An important part of NAMI's mission is to advocate on behalf of people with severe mental illnesses involved in the criminal justice systems. In this capacity, NAMI, along with Public Citizens' Health Research Group, published a report in 1992 entitled *Criminalizing the Seriously Mental Ill* that documented the serious treatment needs of people with severe mental illness who are inmates in jails and prisons.

The National Association of People with AIDS (NAPWA), founded in 1983, advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS.

MAR 27 1998

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CLERK

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *et al.*,
v. *Petitioners,*

RONALD YESKEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF NATIONAL ASSOCIATION OF
PROTECTION AND ADVOCACY SYSTEMS,
JUDGE DAVID L. BAZELON CENTER FOR MENTAL
HEALTH LAW, AND NEW YORK LAWYERS FOR THE
PUBLIC INTEREST, AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS

STEVEN J. SCHWARTZ
Counsel of Record
JAMES R. PINGEON
CENTER FOR PUBLIC
REPRESENTATION
246 Walnut Street
Newton, Massachusetts 02160
(617) 965-0776

STEPHEN F. HANLON
LESLIE S. SPITALNEY
LEO C. RYDZEWSKI
HOLLAND AND KNIGHT LLP
2100 Pennsylvania Avenue
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorneys for Amici Curiae

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-634

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,
v.

RONALD YESKEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF NATIONAL ASSOCIATION OF
PROTECTION AND ADVOCACY SYSTEMS,
JUDGE DAVID L. BAZELON CENTER FOR MENTAL
HEALTH LAW, AND NEW YORK LAWYERS FOR THE
PUBLIC INTEREST, AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Amici curiae the National Association of Protection and Advocacy Systems (NAPAS), the Judge David L. Bazelon Center for Mental Health Law (Bazelon Center), and the New York Lawyers for the Public Interest (NYLPI) are organizations which advocate for the rights and interests of persons with disabilities, including their rights under various disability statutes such as the ADA.¹ Spe-

¹ Counsel for the amici curiae authored this brief in its entirety. No person or entity other than the amici curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to

cifically, NAPAS is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings, including prisons and other correctional facilities. The Bazelon Center is a national legal advocacy organization which seeks full integration into the community of people with mental disabilities by protecting their rights to choice and dignity and expanding their access to housing, employment, and other services under the ADA and other statutes. NYLPI represents numerous individuals in various institutional settings, including prisons, and files amicus briefs on its own behalf and on behalf of disability and civil rights groups on cases addressing the application of the ADA.

Amici curiae are deeply familiar with our Nation's history of invidious discrimination against individuals with disabilities and with the various legislative efforts to redress this discrimination, particularly the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA). These organizations and the individuals whom they represent have direct experience with the state sponsored discriminatory activities and attitudes which informed Congress in its drafting of the ADA. They have a direct stake in the interpretation of the Act, including both its scope and its constitutionality.

Amici curiae recognize that the petitioners generally do not challenge the constitutionality of Title II of the ADA. However, several of their *amici* do, asking the Court to declare Title II unconstitutional with respect to all state entities, or at least with regard to its application to prisons and presumably other correctional activities. This brief is submitted in response to the broad and unfounded consti-

the filing of this brief and letters of consent have been filed with the Clerk of the Court.

tutional arguments of petitioners' *amici* with respect to Congress' authority under Section 5 of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

Since the petitioners did not raise the constitutionality of Title II of the ADA in the court below and since this issue is not properly included in the Question Presented, the Court should not reach out to decide whether Title II is a proper exercise of Congress' authority.

If the Court does deem it appropriate to address the constitutional issue, it should conclude that Title II is a reasonable and congruent response to the pervasive pattern of discrimination, fear, and inaccurate stereotypes which characterizes our Nation's treatment of individuals with disabilities. Title II is proportionate to the evil of state sponsored, invidious discrimination against persons with disabilities that this Court has recognized and Congress has found. The statute, both in general and as applied to correctional settings and other institutions, is an appropriate expression of Congress' power under Section 5 of the Fourteenth Amendment to remediate and prevent such discrimination in state activities.

Deference to prison administrators does not require the abdication of judicial decisionmaking concerning the application of federal law. The ADA can be implemented in prisons in a manner which respects the States' valid penological interests. Just as other nondiscrimination statutes, designed to prevent unequal treatment on the basis of race or gender and to remedy the exclusion of students from public education, have been applied and adjusted to prison conditions, so too can the ADA.

ARGUMENT

I. THE COURT SHOULD NOT REACH THE QUESTION OF WHETHER TITLE II OF THE ADA, EITHER IN GENERAL OR AS APPLIED TO PRISONS, IS CONSTITUTIONAL.

The lower court did not consider or decide the issue of whether the ADA may constitutionally be applied to prisons. Petitioners made no argument and the court of appeals made no ruling on the constitutionality of the ADA. *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3d Cir. 1997). Before this Court petitioners concede the ADA legitimately applies to portions of the prison environment and to persons who visit, work in, or are otherwise present in prison, other than prisoners themselves. Pet. for Cert at 11. Petitioners also recognize that Title II of the ADA is generally a legitimate exercise of Congress' authority to redress discrimination under Section 5 of the Fourteenth Amendment, see Pet. Br. at 13, 26, although not with respect to state prisoners. *Id.* at 31.

The constitutionality of the ADA is not fairly within the question presented.² Given petitioners' concessions about the constitutionality of Title II where Congress has made specific findings, the question is one which requires scrutinizing the factual record before Congress as to the nature, scope, and persistence of discrimination against persons with disabilities in a wide range of activities, including correctional settings. Further, a constitutional

² That question is "Does the Americans with Disabilities Act apply to inmates in state prisons." Pet. for Cert. i. The question is framed as, and should be decided as, one of statutory construction. The analysis of the statute's scope is not so inextricably intertwined with the question of Congress' authority as to require a constitutional decision. The decision of the court of appeals can be reviewed solely as a matter of statutory interpretation. Nor should the Court reach out to decide the constitutional question, since that issue can be addressed, if and when it is appropriately presented.

analysis of the ADA would not definitively resolve the practical questions faced by prison administrators regarding their obligations to disabled prisoners because lower courts have also prohibited discrimination against prisoners under the Rehabilitation Act, 29 U.S.C. § 794. See *Duffy v. Riveland*, 98 F.3d 447, 453 (9th Cir. 1996).³

In light of the well-established rule that the Court should not consider constitutional issues which are not decided below, the Court need not and should not accept petitioners' or its *amici's* invitation to determine whether the application of the ADA to state prisons is a proper exercise of Congress' authority. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Just as the Court declined to address the constitutionality of extending Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, to states because it was not raised below, *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977), so here it should reject the invitation to decide the constitutionality of the ADA when the petitioners did not argue this issue in the lower courts.

II. THE ADA IS AN APPROPRIATE EXERCISE OF CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.⁴

A. The Court Has Already Concluded That Invidious Discrimination Against Persons With Disabilities, Based Upon Stereotypes and Archaic Laws, Violates the Equal Protection Clause.

The issue of invidious discrimination against persons with disabilities is not new to this Court. *City of Cleburne*

³ The constitutionality of the Rehabilitation Act is not subject to question, since it was promulgated pursuant to Congress' spending authority and since most states receive federal funding for the operation of their prisons. See *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996).

⁴ *Amici* do not address a second important source of Congress' authority to enact Title II of the ADA pursuant to the Commerce Clause. This authority has been relied upon to sustain other anti-

v. Cleburne Living Center, 473 U.S. 432 (1985); *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987). In *Cleburne* the Court recognized that: "Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms." 473 U.S. at 446. It concluded that the discriminatory application of a uniquely local function—land use—could not withstand scrutiny, despite a number of proffered justifications which otherwise would satisfy a rational basis standard.⁶ 473 U.S. at 448-50. The *Cleburne* majority emphasized, as this Court has in cases before and since, that decisions based upon "mere negative attitudes, or fear" cannot meet the constitutional requirement that governmentally imposed distinctions must be relevant to a legitimate state interest. *Id.* at 448. See *Romer v. Evans*, 116 S.Ct. 1620

discrimination statutes. *EEOC v. Wyoming*, 460 U.S. 226 (1983). Congress clearly enacted the ADA pursuant to this Clause. 42 U.S.C. § 12101(b). Activities covered by the ADA, including equal access to transportation, communications, public accommodations, employment, and many governmental services are properly within the reach of its Commerce Clause powers, even after *Printz v. United States*, 117 S. Ct. 2365 (1997). Since many applications of Title II do not involve damages or retrospective relief, in those situations there would be no Eleventh Amendment constraint on Congress' Commerce Clause powers. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Moreover, this Clause unquestionably provides a proper foundation for Title II of the Act with respect to county and municipal government entities, such as local jails, as well as with respect to private prisons operating under contract with the states.

⁶ It is significant that many of the factors relied upon by the City of Cleburne and rejected by the Court have been found in other cases to be rational reasons for sustaining government decisions. *Id.* at 458-59 (Marshall, J., concurring in the judgment and dissenting in part). The Court's conclusion—that the city's zoning ordinance was unconstitutionally applied to the Cleburne Living Center—strongly suggests the adoption of a more invigorated standard of review than deferential rationality. It is this more invigorated rational basis standard which really is applied by Justice White and which is necessary to secure a majority of the Court.

(1996); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). Justice White's opinion makes a special point of acknowledging the many ways Congress has acted to protect persons with disabilities from segregation, discrimination, and denial of equal access, including passage of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, which is the predecessor to the ADA. *Cleburne*, 473 U.S. at 443. The opinion points to the superiority of the legislative forum for determining the most appropriate methods for addressing these issues. *Id.* In fact, the Court's equal protection standard is justified in significant part as a method for encouraging and accommodating legislative judgments by not subjecting them to invalidation under a more rigorous standard of review. *Id.* at 442-43.

In a separate concurring opinion, Justice Stevens stated the relevant equal protection standard somewhat differently: whether a rational member of the disadvantaged class could ever approve of the discriminatory application of the rule in question. 473 U.S. at 455 (Stevens, J., joined by the Chief Justice, concurring). Three members of the Court, while joining in the judgment that the city's zoning ordinance cannot withstand constitutional scrutiny, catalogued a litany of state enforced segregation,⁶ state enacted discrimination,⁷ and other invidious forms of un-

⁶ The indefinite, involuntary confinement of persons with mental disabilities in large, segregated institutions became the accepted method for rendering retardation, as well as people with retardation, invisible to society. 473 U.S. at 462-63. This form of state enacted segregation, as well as others, are explicitly noted in Congress' Findings in the ADA. See 42 U.S.C. § 12101(a)(2).

⁷ State statutes which required the compulsory sterilization of persons with retardation, prevented them from marrying, deprived them of custody of their offspring, and prohibited them from exercising the usual vestiges of citizenship remain among the most pernicious form of state sponsored discrimination. 473 U.S. at 461-64. These statutes informed Congress' Findings on the scope of discrimination encountered by individuals with disabilities. 42 U.S.C. § 12101(a)(3).

equal treatment.⁸ *Id.* at 461-66 (Marshall, J., joined by Brennan, J., and Blackmun, J.) Justice Marshall's opinion argues for a flexible equal protection standard that varies with the importance of the interest affected and the invidiousness of the basis for the classification. *Id.* at 460, citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99 (Marshall, J., dissenting). Most importantly for purposes here, it recognizes the proper role of the Court in affording respect to legislative judgments that reflect "evolving standards of equality," as it did with respect to gender. *Id.* at 466, citing *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Despite the somewhat different language used in all three opinions to strike down the City of Cleburne's unequal treatment of persons with disabilities, the full Court affirmed that persons with retardation have been routinely subjected to a regime of invidious discrimination which violates the Equal Protection Clause of the Fourteenth Amendment. In so doing, the Court confirmed what Congress was to find five years later: that persons with disabilities have long been subjected to a widespread and persistent pattern of unconstitutional discriminatory treatment that is incorporated into archaic laws, that is reflected in public policies, practices and activities, and that is grounded in prejudice and inaccurate stereotypes about persons with disabilities.

Not surprising, when the Court was asked to review two different nondiscrimination statutes adopted by Congress in response to this pattern of unequal treatment of persons with disabilities, the Court gave each an expansive application. In interpreting the definition of handicapped

⁸ Persons with mental and physical disabilities traditionally were totally excluded from public schools and other public activities and programs. 473 U.S. at 464, nn.13, 17. It is this history of state sponsored discrimination which guided Congress' judgment in enacting Title II of the ADA and other remedial statutes and which is specifically cited in its Findings. 42 U.S.C. § 12101(a)(5).

person in § 504, the Court concluded that Congress was legitimately concerned with "protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps'." *Arline*, 480 U.S. at 279. It found that the basic purpose of the statute "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 284.⁹ In *Dellmuth v. Muth*, 491 U.S. 223 (1989), the Court accepted the state's concession¹⁰ that Congress could abrogate the state's Eleventh Amendment immunity through its remedial authority under Section 5 of the Fourteenth Amendment, provided it had a proper record of discrimination before it and provided that it did so clearly. Indeed, the Court acknowledged that Congress had done precisely this in its 1986 amendments to the Rehabilitation Act. 491 U.S. at 228-29. While the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 *et seq.*, did not contain such a clear statement of abrogation, the Court left no doubt that Congress could legitimately accomplish this result in light of the history of exclusion, segregation, and discriminatory treatment of persons with disabilities which informed its adoption of the EHA.¹¹

⁹ During the same Term as *Cleburne*, the Court reviewed the legislative history of § 504 of the Rehabilitation Act and determined that the Act properly reached all forms of discrimination. *Alexander v. Choate*, 469 U.S. 287, 297-98 (1985).

¹⁰ It was an agency of the Commonwealth of Pennsylvania, a petitioner here, which made that concession.

¹¹ In fact, even before the Court's decision in *Dellmuth*, Congress did just that: it explicitly abrogated the State's Eleventh Amendment immunity for suits brought under the EHA. 42 U.S.C. § 2000d-7.

Congress was well aware of this Court's conclusions that persons with various disabilities have been subjected to a regime of invidious discrimination and a denial of due process in a broad range of public services and activities. That regime includes purposeful segregation, persistent patterns of hostility, prejudice and negative stereotypes, and archaic laws which, taken together, confirm Congress' subsequent findings of unconstitutional discrimination against persons with disabilities by the States. This regime, as documented and elaborated before numerous Congressional committees, provides the constitutional predicate for Title II of the ADA.

B. Congress Has Broad Authority Under Section 5 of the Fourteenth Amendment to Intrude on State Functions When Necessary to Address Invidious Discrimination and to Adopt a Comprehensive Approach to Prevent, As Well As to Remediate, Discrimination.

Section 5 of the Fourteenth Amendment enlarged Congress' power as against the States and provided it with the constitutional authority to adopt any rational means to combat discrimination. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), citing *Ex Parte Virginia*, 100 U.S. 339 (1879). In interpreting Congress' power under the Civil War Amendments, the Court has proclaimed:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex Parte Virginia, 100 U.S. at 345-46, quoted approvingly in *City of Boerne v. Flores*, — U.S. —, 117

S.Ct. 2157, 2163 (1997). The *Boerne* Court noted that this rule has been applied to uphold Congress' authority to enforce the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Fifteenth Amendment, *South Carolina v. Katzenbach*, 383 U.S. at 326 (collecting cases), and the Eighteenth Amendment, *James Everard Breweries v. Day*, 265 U.S. 545 (1924). *City of Boerne*, 117 S.Ct. at 2163. The rule is not limited to state policies and practices which themselves have been determined to violate the Fourteenth Amendment.

A construction of § 5 which would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay v. New York*, 332 U.S. 261, 283-84 (1947).

Katzenbach v. Morgan, 384 U.S. at 648-49.¹²

¹² *Morgan* involved the question of whether an English literacy test, as applied to Spanish speaking members of New York's Puerto Rican community, could be prohibited by Congress under its Section 5 powers, even if such a test did not itself violate the Equal Protection Clause and was otherwise constitutional. The Court had little difficulty in upholding Congress' broad remedial authority to enjoin otherwise constitutional conduct. In doing so it reaffirmed its early rulings that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Morgan*, 384 U.S. at 651. While this authority is not without limits, the proper boundaries are determined in the first instance by Congress, based upon its assessment

This Court only recently reviewed and affirmed the long line of cases upholding Congress' authority to redress and prevent discrimination pursuant to Section 5 of the Fourteenth Amendment. *City of Boerne*, 117 S.Ct. at 2163, 2167. Acting pursuant to its broad remedial powers under Section 5, Congress can enjoin unintentional discrimination, even though only intentional discrimination is prohibited by Section 1. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *City of Rome v. United States*, 446 U.S. 156, 173 (1980). As this Court has recognized: "When a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). As long as the federal enactment is reasonably related to the goal of enforcing the Equal Protection Clause, Congress may outlaw practices not themselves violative of that Clause. *City of Rome*, 446 U.S. at 175-77 (reviewing cases under the Fourteenth and Fifteenth Amendments); *City of Boerne*, 117 S.Ct. at 2167.

Not only does Congress' remedial authority extend beyond intentional violations of the Fourteenth Amendment, Congress may act in one arena to prevent discrimination against a disfavored group in another. Thus, a state requirement that voters read and write English, while not unconstitutional on its face, was still subject to Congressional prohibition under Section 5 of the Fourteenth Amendment as a way of "gaining nondiscriminatory treatment in public services for the entire Puerto Rican com-

of the record of discrimination, and only then by the Court, with substantial deference to Congress' superior fact-finding function. "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* at 653. See *City of Boerne*, 117 S.Ct. at 2170; *Oregon v. Mitchell*, 400 U.S. 112, 207 (Opinion of Harlan, J.) and at 247-49 (opinion of Brennan, White and Marshall, JJ.)

munity."¹³ *Morgan*, 384 U.S. at 652. See also *Oregon v. Mitchell*, 400 U.S. at 133 (opinion of Black, J.) (educational segregation and inequality justifies voting remedies). The *Morgan* Court observed:

It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of state interests. . . .

384 U.S. at 653. Congress made just such a judgment in enacting Title II of the ADA and in applying it to all state entities and activities, without exception or enumeration.¹⁴

Nor is it essential that Congress restrict its remedy solely to instances, areas, or locations where it has specific evidence of unconstitutional discrimination. *City of Boerne*, 117 S.Ct. at 2163. Rather, based upon its experience with the ineffectiveness of more limited approaches, it can adopt a comprehensive scheme designed to prevent as well as remediate discrimination in places where it does not yet exist. The full Court, in five separate opinions, unanimously confirmed that Congress has

¹³ This dual rationale for the Court's opinion in *Morgan* was explicitly endorsed in *City of Boerne*, 117 S.Ct. at 2168, thereby confirming that Congress may act to ensure that a previously excluded group has full access to all relevant public services and activities.

¹⁴ Congress' remedial powers are also reflected in its enactment of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 *et seq.*, which authorizes the Department of Justice to protect the constitutional rights of persons involuntarily confined in state facilities, including psychiatric hospitals, prisons, and jails. CRIPA was explicitly adopted pursuant to Section 5 of the Fourteenth Amendment. S. Rep. No. 416, 96th Congress, 1st Sess. 42 (1980), reprinted in 1980 USCCAN 783823.

power to ban the use of literacy tests nationwide, after more focused prohibitions had proven too cumbersome and inefficient. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (separate opinions of Black, J., 400 U.S. at 127-28; Douglas, J., 400 U.S. at 145; Harlan, J., 400 U.S. at 216; Brennan, White, and Marshall, JJ., 400 U.S. at 232-33; and Stewart, the Chief Justice, and Blackmun, JJ., 400 U.S. at 283-85). As Justice Black wrote, after noting the extensive evidence of discrimination considered by Congress: "In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious *national* dilemma that touches every corner of our land." *Id.* at 133. And as Justice Brennan recognized, Congress could fairly conclude that state sponsored discrimination in one area (education) might require remedial action in another (voting), or that more narrow remedies which prove to be unsuccessful or burdensome subsequently might justify more comprehensive ones. *Id.* at 235-36.

Finally, in enacting remedial and prophylactic legislation under Section 5, Congress may adopt criteria that do not precisely mirror judicially-formulated equal protection standards and which take into account the need to prevent invidious discrimination which is not easily susceptible to proof. Compare *Dothard*, 433 U.S. at 331, n.14 (recognizing business necessity and *bona fide* occupational qualification tests in Title VII) with *Washington v. Davis*, 426 U.S. 229 (1976); compare *City of Rome*, 446 U.S. at 163-64 (approving preclearance standards and procedures in the Voting Rights Act) with *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Were it otherwise, Congress would be unable to exercise the full reach of its Section 5 authority to address arbitrary and irrational discrimination against a non-suspect class, to prevent as well as remedy discrimination, to redress discrimination that has a disparate impact on the disfavored group, and to correct the underlying causes of the invidious discrimination that are

evidenced in other areas of society. In effect, Congress would be restricted to drafting statutes which do no more than prevent what the Constitution already proscribes.¹⁶ It would be unable to develop appropriately tailored compliance standards and flexible implementation criteria. While Congress clearly cannot "alter the meaning" of the clause it is seeking to enforce, *City of Boerne*, 117 S.Ct. at 2164, it may do more than incorporate a judicial standard of review as the only means of enforcing its remedial enactments.

Neither the prohibitions of the Equal Protection Clause nor the reach of Congress' Section 5 powers is limited to suspect classifications. See *Cleburne*, 473 U.S. at 450. Where a legislative classification is irrational or arbitrarily targets a specific group based upon historic and inaccurate stereotypes, prejudice, or animus, it violates the Equal Protection Clause regardless of the level of scrutiny employed. *Romer v. Evans*, 116 S.Ct. at 1627. "Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status . . . are a denial of equal protection of the laws in the most literal sense." *Id.* at 1628. Moreover, such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.*, citing *Department of Agriculture v. Moreno*, 413 U.S. at 534. Where legislative classifications "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior,

¹⁶ In fact, Congress would be effectively precluded from legislating at all with respect to classifications other than those based upon race, alienage, or national origin, thereby undermining its critical fact-finding function and the very scope of Section 1 of the Fourteenth Amendment. Its constitutional authority would also vary with the evolving application of judicially developed standards of equal protection scrutiny. Compare *Frontiero v. Richardson*, 411 U.S. at 688 (strict scrutiny of gender classification) with *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980) (intermediate scrutiny).

the objective itself is illegitimate." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1980).¹⁶ These principles are equally true regardless of the level of suspectness of the classification.¹⁷

Since the Fourteenth Amendment was enacted after the Tenth, the Court has repeatedly noted that the enlargement of Congress' powers to remedy discrimination supercedes the reserved powers of the States. There are no core State functions which are immune from Congress' remedial authority or beyond the reach of its Section 5 powers.¹⁸ The Court has recognized that even intrusions upon the most fundamental of state functions—the electoral process and the selection of its representatives—are subservient to the equal protection mandate of the Four-

¹⁶ This history of discrimination, devaluation grounded in pejorative stereotypes, exclusion, and irrational protectionism is an equally accurate description of the State's treatment of persons with disabilities. See *Cleburne*, 473 U.S. at 446, 461-64, *Arline*, 480 U.S. at 279.

¹⁷ For instance, in *Maher v. Gagne*, 448 U.S. 112 (1980) the Court upheld the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988 as a valid exercise of Congress' Section 5 powers, although it covers any person who prevails on civil rights claim, regardless of the level of scrutiny employed under the Fourteenth Amendment.

¹⁸ Chief Justice Rehnquist quoted at length from *Ex Parte Virginia* in describing the scope of Congress' authority with respect to the State's power over traditional functions and discretionary activities:

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. . . . Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Fitzpatrick, 427 U.S. at 454-55, quoting from *Ex Parte Virginia*, 100 U.S. at 346-48.

teenth Amendment and that Congress has ample authority to remedy demonstrated violations of that Clause. *Chandler v. Miller*, 117 S.Ct. 1295, 1302 (1997) ("We are aware of no precedent suggesting that a State's power to establish qualifications for state offices—any more than its sovereign power to prosecute crime—diminishes the constraints on state action imposed by the Fourteenth Amendment"); *Oregon v. Mitchell*, 400 U.S. at 249-50. As the Chief Justice eloquently declared, in approving the application of a damage remedy under Title VII against the States:

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for the private suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick, 427 U.S. at 456 (footnote omitted).

Petitioners and its amici read *City of Boerne* as a retreat from the long line of voting rights and other civil rights decisions upholding Congress' expansive authority under Section 5 of the Fourteenth Amendment. Pet. Br. at 25-26. To the contrary, the Court repeatedly reaffirmed the holdings of those cases in *City of Boerne*, 117 S.Ct. at 2163, and restated its endorsement of Congress' broad prerogatives that concomitantly limit the States' otherwise reserved powers: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States'." *Id.*, quoting from *Fitzpatrick v.*

Bitzer, 427 U.S. at 455. More properly construed, *Boerne* simply reaffirms what Justice Black noted more than twenty-five years earlier: Congress' Section 5 authority is not wholly unlimited. *Oregon v. Mitchell*, 400 U.S. at 128. Properly exercised, that authority must be rooted in a factual foundation of unconstitutional discrimination and must adopt approaches that are congruent and proportional to Congress' findings. *Id.* at 2169. It is this expansive, albeit not unlimited, power which Congress exercised when it conducted extensive factual inquiries and passed a proportionate remedial statute prohibiting all forms of discrimination by any public entity when it enacted Title II of the ADA.

C. The ADA Was Enacted Pursuant to Section 5 of the Fourteenth Amendment to Remedy the Pattern of Unconstitutional Discrimination Imposed Upon Persons With Disabilities.

Title II of the ADA, like the Voting Rights Acts of 1965 and 1970, and Titles VI and VII of the Civil Rights Act of 1964, is grounded in an extensive Congressional factual record and findings of invidious discrimination against persons with disabilities which required a comprehensive national solution. It is, of course, entitled to the usual presumption of constitutionality. In addition, as a legislative judgment that is based upon careful consideration of empirical data concerning the *present* impact of discrimination against persons with disabilities in a multitude of areas, as well a thorough assessment of the Nation's treatment of persons with disabilities both historically and to date, it should be afforded particular deference. *City of Rome*, 446 U.S. at 181-82; *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 117 S.Ct. 1174, 1189 (1997). Congress conducted an extensive review of a lengthy record, and had over three decades of experience with more tailored approaches in redressing discrimination in education, housing, employment, architectural barriers, and health care services. Congress knew what was

needed to remedy this tradition of invidious discrimination and knew that a comprehensive, national scheme was essential to alter the attitudes of hostility and fear which characterized our Nation's treatment of persons with disabilities.

In contrast to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, struck down in *City of Boerne*, Congress had before it a record of *current* discriminatory patterns and animus by public entities which demonstrated that bigotry and discriminatory treatment was widespread, longstanding, and deeply rooted. *Id.* 117 S.Ct. at 2167. This persistent pattern of exclusion was incorporated in both intentional, state sponsored disparate treatment as well as state actions that have a grossly disproportionate burden on citizens with disabilities. The latter as well as the former is a legitimate basis for inferring bigotry and hostility sufficient to support Congress' broad remedial and prophylactic authority in enacting Title II of the ADA. *City of Boerne*, 117 S.Ct. at 2163. Moreover, unlike RFRA—where no actual discrimination need be proven to state a violation of the Act—the ADA requires claimants to demonstrate both that they are within the specific group protected (a “qualified person with a disability”, see 42 U.S.C. § 12131) and that the defendant state entity has discriminated against them. Such discrimination may include situations where a public entity refuses to make a reasonable accommodation that would not place an undue burden on the entity and would not require a fundamental alteration of its program. This standard is not only far more flexible and deferential to legitimate state interests, including resource constraints, than is RFRA's compelling state interest and least restrictive alternative criteria, but, as a practical matter, it requires a respectful balancing of the State's interests and the individual's claim to be afforded equal treatment. *Alexander v. Choate*, 469 U.S. at 308-09. Simply put, the standards for assessing and the burden for proving an ADA violation affords each State “discretion

to achieve its goals *in the way it thinks best*" and, rather than entirely overriding that discretion, only subjects it to a "reasonable federal standard." *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983).

The ADA, and specifically Title II, does not decree the substance of the Fourteenth Amendment, *City of Boerne*, 117 S.Ct. at 2164. Instead, it is a legitimate effort to prevent and remediate discrimination by establishing criteria designed to allow persons with disabilities to compete equally with other members of society. *Morgan*, 384 U.S. at 652. See *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."). Requiring reasonable accommodation as a method to redress a persistent pattern of invidious discrimination is not a special privilege, but instead a necessary and reasonable element of the remedy for the "evil presented." *City of Boerne*, 117 S.Ct. at 2169. It is preventive precisely because it demands that state agencies demonstrate that their different treatment of persons with disabilities is not the product of inaccurate stereotypes or irrational fears. It is remedial by ensuring that the fundamental interest of individuals with disabilities to participate in various governmental services and activities, rather than being excluded or segregated, is respected. This is particularly important given the "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of persons with disabilities. *Cleburne*, 473 U.S. at 467 (Marshall, J.).

The ADA was not enacted to reverse a prior Supreme Court decision,¹⁹ to modify an interpretative principle, or to establish a different standard for assessing constitutional conduct. Rather, it was a further legislative response to a

¹⁹ A careful search of the legislative history reveals no mention of dissatisfaction with the Court's disability cases, including its leading equal protection decision in *City of Cleburne v. Cleburne Living Center*, *supra*.

pervasive problem Congress had long recognized, and previously responded to, albeit in a piecemeal fashion. In fact, the ADA is precisely the type of flexible legislative judgment which the *Cleburne* court sought to preserve in adopting its invigorated rational basis review.²⁰ *Cleburne*, 473 U.S. at 442-43. The ADA neither "changes" nor defines the underlying constitutional rights set forth in Section 1, but instead establishes a moderate, flexible, and narrowly tailored scheme to redress the patterns of discrimination suffered by persons with disabilities at the hands of public entities. As such, it is properly preventive and remedial, not a substantive modification of the actual meaning of Section 1 of the Fourteenth Amendment.

As required by *City of Boerne*, Title II reflects a congruence between the nature and scope of the discrimination which Congress considered and sought to remedy and the means Congress chose to accomplish its constitutional responsibility. It was enacted in response to nine comprehensive Congressional Findings in order to combat the persistent pattern of state sponsored discrimination which has long characterized our Nation's shameful history of disenfranchising, segregating, and excluding persons with disabilities from public activities. That record was generated by numerous hearings before multiple committees of the Congress, all of which documented a persistent pattern of national scope that covered virtually every form of public agency and activity, including law enforcement, corrections, and prisons. That Congress adopted an unconditional term—"all public entities"—is reasonable in light of the record of state codified and sponsored discrimination which infected so many state practices for so

²⁰ It would be ironic indeed if, as some of petitioners' amici suggest, Congress could not act to prevent discrimination against persons with disabilities solely because this Court had adopted a level of equal protection scrutiny that was designed to encourage just those legislative enactments such as Title II. *Cleburne*, 473 U.S. at 444.

long.²¹ Moreover, Congress could reasonably conclude that its prior piecemeal approach to legislating with reference to subject matter or source of funding was no longer appropriate, efficient, or likely to produce the equal opportunity to which persons with disabilities still were being denied. *City of Boerne*, 117 S.Ct. at 2167, citing *South Carolina v. Katzenbach*, 383 U.S. at 308, 313-15, 333-34. That Congress continued to proscribe unintentional discrimination as well as purposeful disparate treatment, as it had in prior legislation, see 29 U.S.C. § 794, is entirely consistent with the Court's holdings in *Fitzpatrick*, *EEOC*, and *Choate*. The ADA's basic purpose of equal access, and its reach to all state entities, reflects an appropriate exercise of Congressional authority directed to enhancing the political power of persons with disabilities directly relevant to gaining non-discriminatory treatment in public services. *Morgan*, 384 U.S. at 652. Although comprehensive in scope and prophylactic in approach, it goes no farther than necessary to address a national problem of longstanding and current impact.

Consistent with the command of *City of Boerne*, Title II is proportionate to the persistent patterns of discrimination against persons with disabilities which Congress found. Although proportionality does not "require[] termination dates, geographic restrictions, and egregious predicates," *City of Boerne*, 117 S.Ct. at 2170, the Congressional findings of the ADA certainly reflect such predi-

²¹ The States enacted this disparate treatment through a tapestry of law and policies affecting multiple aspects of the lives of persons with disabilities, including the wholesale denial of the franchise and the freedom to participate in the operations of government, exclusion from public education and other public services, compulsory sterilization and prohibitions on marriage, child-rearing, and intimate relations, involuntary segregation in massive institutions, and unconditional restrictions on the exercise of fundamental civil rights.

cates.²² Significantly, the ADA only applies to a "qualified person with a disability."²³ 42 U.S.C. §§ 12102(2) and 12131(2). Congress purposely chose to narrow its scope to persons with impairments who were able to meet the eligibility standards for the relevant activity. Most importantly, the responsibility of state entities is not unlimited. States and their agencies are not required to eliminate every vestige of discriminatory treatment nor forebear from ever treating persons with disabilities unequally. Thus, Title II and its implementing regulations properly reflect this Court's recognition that there are some undeniable differences between persons with disabilities and those without impairments, as well as between persons with different disabilities. *Cleburne*, 473 U.S. at 444. See 28 C.F.R. 35.130(b)(7), 35.150(a)(3) and 36.164. Only when such inequality can be remedied by an accommodation which does not impose an undue burden on the state entity or require a fundamental alteration of the state's program or service does Title II command non-discriminatory treatment. 42 U.S.C. §§ 12101(10) and 12302(b)(2)(A)(ii).²⁴ Finally, Title II is proportionate precisely because it is "responsive to, or designed to prevent, unconstitutional behavior," given the indisputable reality that many of the invidiously discriminatory state

²² Of particular significance is the second finding:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination continue to be a serious and pervasive social problem.

42 U.S.C. § 12101(a).

²³ Thus, unlike RFRA which is unlimited in its scope and applicable to everyone, the ADA is a carefully tailored response to the problem Congress sought to address.

²⁴ This is obviously a far more flexible and deferential standard than the compelling state interest and less restrictive alternative criteria that contributed to the Court's disapproval of RFRA. *City of Boerne*, 117 S.Ct. at 2171.

laws, policies, and practices that it was designed to correct "have a significant likelihood of being unconstitutional." *City of Boerne*, 117 S.Ct. at 2170. See *Cleburne*, 473 U.S. at 446.

The three courts of appeals which have directly addressed the constitutionality of Title II of the ADA have concluded that the application of this non-discrimination statute to the States is a valid exercise of Congress' Section 5 powers. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (prisons); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) (prisons); and *Coolbaugh v. State of Louisiana*, — F.3d —, 1998 WL 84123 (5th Cir. Feb. 27, 1998) (motor vehicles).²⁶ As the Fifth Circuit explained:

In sum, the ADA represents Congress' considered efforts to remedy and prevent what is perceived as serious, widespread discrimination against the disabled. We recognize that in some instances, the provisions of the ADA will "prohibit [] conduct which is not itself unconstitutional and intrude[] into 'legislative spheres of autonomy previously reserved for the States.'" *Flores*, — U.S. —, 117 S.Ct. at 2163 (quoting *Fitzpatrick*, 427 U.S. at 455). We cannot say, however, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the *Flores* proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions.

Id. at *7.

Title II of the ADA, like the Voting Rights Act of 1965 and 1970 and Titles VI, VII, and IX of the Civil Rights Act of 1964, does not threaten the independent existence

²⁶ The latter two decisions post-dated *City of Boerne* and thus reached their conclusions based upon a careful analysis of the congruence and proportionality test established by this Court for evaluating exercises of Congressional authority under Section 5.

of the States, with respect to any state entity or activity, including prisons.²⁶ Prisons are no more a critical aspect of state sovereignty than public education, juries, or state employment, and arguably less than voting, all of which are explicitly mentioned in the ADA, 42 U.S.C. § 12101 (a)(3) and cited approvingly by the petitioners as a proper exercise of Congress' Section 5 power. Pet. Br. 13-14. Nor is it less central than land use regulation, which Congress restricted in the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and which the Court recently endorsed as applied to persons with disabilities. *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995). The limitations on the State's traditional regulatory power that are imposed by Title II in the operation of government and the provision of public services, including prisons, were clearly envisioned by Congress and are entirely appropriate to redress, as well as to prevent, the persistent pattern of invidious discrimination that both the Congress and this Court found with respect to persons with disabilities. 42 U.S.C. § 12101(a); *Cleburne*, 473 U.S. at 446 and at 461-64.

III. LIKE OTHER NONDISCRIMINATION STATUTES WHICH HAVE BEEN APPLIED TO PRISONS, TITLE II CAN BE IMPLEMENTED IN A MANNER THAT AFFORDS DUE RESPECT TO VALID PENOLOGICAL INTERESTS.

The application of civil rights and equal protection remedial statutes such as the ADA to state prisons is neither novel nor unprecedented. While the Court has repeatedly

²⁶ While, as Chief Judge Posner noted in concluding that the ADA did apply to state prisons, there may be some "inner core of sovereign functions" which go to the very balance of power between the separate branches of state government, prisons, education, and other public services are not amongst them. *Crawford*, 115 F.3d at 483. This case does not present the question of the applicability of the ADA to functions which define the very existence of the States.

acknowledged the need to defer to prison administrators with respect to the balancing of valid penological interests with the exercise of inmates' federally-protected rights, it has never deferred to such administrators in determining whether the Constitution or a federal statute applies in the first instance.

The Court's deference to prison administration is a policy of restraint, not abdication, and it does not impact an inmate's right to seek redress for violations of constitutional and statutory law:

a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state prison. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). See also *Turner v. Safley*, 482 U.S. 78, 84 (1987). Thus, while the contours of individual rights are altered in prison, it cannot be disputed that "constitutional and statutory requirements" apply in this setting. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Turner*, 482 U.S. at 84.

It is significant that many forms of nondiscriminatory treatment and related accommodations required by the ADA are otherwise constitutionally mandated, either by the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. For instance, in an opinion authored by retired Supreme Court Justice Powell, the Fourth Circuit Court of Appeals held that the failure to provide a paraplegic inmate with a handicap accessible toilet constituted cruel and unusual punishment. *LaFaut v. Smith*, 839 F.2d 387 (4th Cir. 1987). The court also declared unconstitutional the failure to modify the toilet facilities in the inmate's work area, rejecting the claim that this would cause the "toilets to be temporarily inoperative, and this 'would be highly inconvenient for all staff

and inmates who work in the area.' " *Id.* at 393. Similarly, the Due Process Clause mandates that inmates with disabilities receive accommodations at prison administrative hearings, which can include not only interpreters for deaf inmates but also legal assistance for inmates with mental disabilities. See *Ruiz v. Estelle*, 503 F.Supp. 1265, 1346 (S.D.Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982) (mentally retarded prisoners facing disciplinary charges must be provided "the assistance of counsel substitute, a right clearly contemplated by the due process clause. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974)").²⁷

Just as the principle of deference shown by courts to prison administrators has never prevented the application of § 1983,²⁸ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,²⁹ Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a),³⁰ and the Individ-

²⁷ The Court held in *Wolff* that ordinarily inmates have no right to assistance at such hearings.

²⁸ Although 42 U.S.C. § 1983 does not explicitly mention prisons, the Court frequently has allowed state prisoners to seek redress under this statute for violations of federally-protected rights. *Cooper v. Pate*, 378 U.S. 546 (1964); *Houghton v. Shafer*, 392 U.S. 639 (1968).

²⁹ See *Franklin v. District of Columbia*, 960 F. Supp. 394, 432 (D.D.C. 1997) (Title VI would be violated where "prison programs [were] offered based upon an inmate's race or ethnic origin").

³⁰ See *Klinger v. Department of Corrections*, 107 F.3d 609, 615 (8th Cir. 1997) (Title IX applies to Nebraska state prison system); *Jeldness v. Pearce*, 30 F.3d 1220, 1224-26 (9th Cir. 1994) (Title IX applies to prison education programs). See also *O'Connor v. Davis*, 126 F.3d 112, 118 (2d Cir. 1997). The Ninth Circuit, in discussing Title IX's application to state prisons, properly interpreted the separation of powers principles that should guide a court in considering this issue:

[a court] cannot judicially impose a special exception to these statutes for correctional institutions. . . . If there is a com-

uals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1411-20,³¹ to state correctional facilities, it should not prevent the application of the ADA to such facilities here. As Judge Posner stated:

Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management.

Crawford, 115 F.3d at 486.

elling need to exempt corrections from these requirements regarding education and employment programs, that argument should be addressed to the legislative branch.

Jeldness, 30 F.3d at 1225.

³¹ See *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678 (9th Cir. 1997); *Paul Y. v. Singletary*, 979 F. Supp. 1422 (S.D. Fla. 1997); *Alexander S. By and Through Bowers v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995); *Donnell C. v. Illinois State Bd. of Educ.*, 829 F. Supp. 1016 (N.D. Ill. 1993).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEVEN J. SCHWARTZ
Counsel of Record

JAMES R. PINGEON
CENTER FOR PUBLIC
REPRESENTATION
246 Walnut Street
Newton, Massachusetts 02160
(617) 965-0776

STEPHEN F. HANLON
LESLIE S. SPITALNEY
LEO C. RYDZEWSKI
HOLLAND AND KNIGHT LLP
2100 Pennsylvania Avenue
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorneys for Amici Curiae

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**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,**

Petitioner,

v.

RONALD R. YESKEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

**BRIEF OF THE NATIONAL PRISON PROJECT OF THE ACLU
FOUNDATION AND NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE ATTORNEYS, AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

MARJORIE RIFKIN
ELIZABETH ALEXANDER
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1875 Connecticut Avenue, N.W., #410
Washington, D.C. 20009
(202) 234-4830

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

DAVID M. PORTER
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
Co-Chair Amicus Committee
801 K. Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

Counsel for Amici Curiae

March 30, 1998

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INTEREST OF AMICI CURIAE¹

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. The ACLU established the National Prison Project in 1972 to protect and promote the civil rights of prisoners. In furtherance of that goal, the National Prison Project has brought numerous cases on behalf of prisoners, including disabled prisoners seeking access to prison facilities, services and programs under the Rehabilitation Act and the Americans with Disabilities Act. More specifically, the National Prison Project has a direct interest in the outcome of this case because it represents Petitioners in *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113), which also raises the issue of whether Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act apply to state prisoners.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime, to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of

¹Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

almost 10,000 attorneys and 28,000 affiliate members in fifty states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. As part of its mission, NACDL strives to defend individual liberties guaranteed by the Bill of Rights.

SUMMARY OF ARGUMENT

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court stated: "[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Following this principle, the courts of appeals for the Third, Seventh and Ninth Circuits, and many lower courts have held that the unambiguous statutory language clearly demonstrates Congress' intent to apply Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) to state prisons.

The ADA's explicit statutory findings reflect its purpose to eliminate discrimination in institutionalized settings. The plain language applies the ADA to state and local corrections agencies as "public entities" that provide "programs, services and activities." Furthermore, the ADA explicitly incorporates "the standards applied" under title V of the Rehabilitation Act and its implementing regulations which, as Congress well knew, specifically apply the statute to state prisons.

The intent of Congress is therefore clear. It is also accurately reflected in the ADA regulations promulgated by the Department of Justice (DOJ). Like the § 504 regulations that preceded them, they too specifically include state prisons within the scope of the ADA. DOJ's regulations are entirely

consistent with the broad remedial purpose of the ADA and are entitled to substantial deference under *Chevron*. Because prison management is not an inner "core state function" as that term is used in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), the clear statement rule is inapplicable to this case. In any event, the statutory language is unambiguous.

Disabled prisoners experience enormous obstacles seeking equal access to toilets and showers, as well as other facilities and services. The ADA affords them *equal access*, not special privileges. It requires public entities to make "reasonable modifications" that do not "fundamentally alter" their programs or impose "undue financial or administrative burdens." These are fact-intensive, individualized determinations that take security risks into account, among other factors, and are thus responsive to the concerns of prison administrators.

This Court should decline petitioners' invitation to rewrite the statute by creating out of whole cloth a "prison exception" to the ADA that is flatly contrary to the clearly expressed intent of Congress.

ARGUMENT

I. DISABLED PRISONERS SEEK EQUAL ACCESS TO FACILITIES, NOT BETTER TREATMENT THAN OTHERS

Title II of the ADA, like Section 504 of the Rehabilitation Act, requires the elimination of obstacles to equal access; it does not require public entities to provide special programs or privileges for disabled people. See *Alexander v. Choate*, 469 U.S. 287, 300 & n.20 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397, 410-11 (1979) (distinguishing federal employers' affirmative action

requirement in § 501 from the equal access requirement of § 504); cf. Pet'r Br. at 29. Disabled prisoners "have a right, if the [ADA] is given its natural meaning, not to be treated even worse than those more fortunate [able-bodied] inmates." *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997) (Posner, C.J.). Seeking *equal* access, not better treatment than others, disabled prisoners have raised substantial claims of discriminatory treatment in seeking relief under the Rehabilitation Act and the ADA.²

A. Disabled Prisoners Face Unnecessary Physical Barriers to Prison Services and Programs

Disabled men and women in prisons and jails throughout the country often face dangerous physical obstacles when seeking access to facilities and services such as toilets and showers, dining halls, medical clinics, emergency alarms and exits, and programs.³ Confined in facilities that are not

²The cases cited herein serve to illustrate the range of problems experienced by disabled prisoners; they do not represent an exhaustive list of cases brought by prisoners under the ADA and Rehabilitation Act. *Amici* have discussed facts obtained from pleadings filed in prison cases throughout the country which were not necessarily resolved by the courts. For this reason, *amici* have noted plaintiffs' allegations and cited to relevant pleadings, even in cases where decisions were reported on other issues.

³For a discussion of the demographics of disabled prisoners and a description of the range of disabilities among prisoners, see generally Gardner, *Legal Commentary: The Legal Rights of Inmates with Physical Disabilities*, 14 St. Louis U. Pub. L. Rev. 175, 176-77 (1994).

handicap-accessible, disabled prisoners suffer needlessly because of the failure of prison administrators to make even inexpensive accommodations such as installation of grab-bars and ramps to accommodate their needs.

A wheelchair user in an Indiana county jail alleged that he was locked in a "padded cell [that] had no bed or other furniture, no running water, and only an open drain in the floor for disposal of bodily waste" for three months. *Noland v. Wheatley*, 835 F. Supp. 476, 480 (N.D. Ind. 1993) (denying defendants' motion to dismiss and qualified immunity claim, citing their "complete lack of effort and outright refusal to accommodate" plaintiff). This semi-quadruplegic prisoner reportedly developed pressure sores that were painful and potentially life-threatening. *Id.* at 480. Mr. Noland had no use of his legs, only limited use of his hands, no bladder, and he wore colostomy and urostomy bags for removal of his body waste. *Id.* The sheriff had available other jail cells with running water, but chose not to assign Mr. Noland to one of them. *Id.* Despite the critical importance of hygiene to prevent infection, he was allegedly denied adequate access to soap and water. *Id.* When it was not his "bath day," Mr. Noland was often reportedly forced to eat his meals with human waste on his hands and body due to spillage from his bags. *Id.* at 481.

Toilets are literally beyond the reach of wheelchair users when prison bathroom doorways are too narrow and walls lack proper grab-bars. A bilateral amputee in a county jail in Michigan reportedly fell into the toilet and onto the floor next to it when he attempted to transfer from his wheelchair because the toilet "lacked both handrails and a seat, and was set into a narrow stall into which he could not maneuver his wheelchair." *Kaufman v. Carter*, 952 F. Supp. 520, 524 (W.D. Mich. 1996) (denying defendants' summary judgment motion on qualified immunity grounds for their

failure to provide access to bathrooms and showers). Unable to reach the toilets, paraplegic prisoners with no bladder or bowel control must reportedly remove their urinary catheters in order to empty their waste bags and relieve themselves wherever they may be. *Hadix v. Johnson*, No. 96-2548, Plaintiffs-Appellees' Final Br. at 27 (6th Cir. filed July 30, 1997). Prisoners further allege that they fall when shifting from their wheelchairs to toilets and defecate on themselves in public program areas including schools, libraries, chapels and recreation yards. *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, No. 97-1113, Pet. for Cert. at 3 (U.S. filed Dec. 19, 1997); *Armstrong v. Wilson*, No. 97-686, Opp'n to Pet. for Cert. at 2-3 (U.S. filed Nov. 19, 1997).

Showers pose life-threatening conditions for severely disabled prisoners. Without adequate support, paraplegic prisoners and amputees allegedly risk falling and seriously injuring themselves on dangerous slippery tile or scalding themselves due to their inability to adequately control water temperature. *Kaufman*, 952 F. Supp. at 523; *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, No. 96-7091, Appellants' Opening Br. at 6-7 (4th Cir. filed Oct. 1, 1996).

Medication dispensaries and medical clinics are often accessible with great difficulty, if at all. In Maryland, inmates allege they cannot propel their wheelchairs up the steep ramp necessary to reach the medication dispensary. *Amos*, No. 97-1113, Pet. for Cert. at 3. In Michigan, a 65-year-old wheelchair user with cancer and coronary problems reportedly had to forego his medications because prison staff refused to allow other prisoners to push his wheelchair and he lacked the energy to propel himself to the clinic. *Hadix*, No. 96-2548, Plaintiffs-Appellees' Final Br. at 27.

B. Disabled Prisoners are Subjected

to Discriminatory Exclusion from Programs, Services, and Activities

Confined in isolation units, disabled prisoners are denied access to program facilities or services that are routinely offered to general population inmates. A quadriplegic prisoner in Indiana was housed in an infirmary unit for over one year and denied access to the dining hall, recreation area, visiting, church, work, transitional programs and the library, due to his infirmary placement. *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 559 (7th Cir. 1996) (holding that prison officials discriminated against the plaintiff by denying him access to services). A blind prisoner housed in isolation in the self-care prison unit in Indiana alleged that he was denied access to the dining hall and to outside recreation, church services, education, library and pre-release training although he was ambulatory and once on site, required little assistance. *Crawford v. Indiana Dep't of Corrections*, No. 3:96-CV-0125AS, Complaint at 3-7 (N.D. Ind. filed Feb. 21, 1996). Chief Judge Posner likened his situation to that of an African-American person barred from the dining hall due to prison staff's discriminatory treatment. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997).

In California, prison officials stipulated to the fact that prisoners who use wheelchairs and those on dialysis spend significantly longer periods of time than non-disabled inmates in reception centers, where they have access to fewer programs. *Armstrong v. Wilson*, No. C-94-2307, Statement of Stipulated Facts at 7 (N.D. Cal. filed July 9, 1996). It is reportedly commonplace that disabled prisoners are barred from participation in programs offered to able-bodied prisoners such as religious services, contact family visits, and telephone access, all of which are afforded to general population inmates. *Armstrong*, No. C-94-2307, Statement of Stipulated

Facts at 9-10; *Amos*, No. 96-7091, Appellants' Opening Br. at 10-11.

Deaf and hearing-impaired prisoners are unnecessarily cut off from essential facilities and services ranging from telephones, medical and mental health diagnosis and treatment, counseling, disciplinary, grievance and parole proceedings, and even emergency fire alarm systems.⁴ Without access to qualified sign language interpreters, they are often unable to communicate with prison staff to follow orders, or with health care staff, or to participate in educational, work, training and substance abuse programs to prepare for their release. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1029-32 (S.D.N.Y. 1995).

The discriminatory treatment of disabled prisoners not only makes for harsher punishment in terms of their conditions of confinement; it lengthens their incarceration, because program participation often results in lower security classification and credit toward release. *Amos*, No. 96-7091, Appellants' Opening Br. at 11; *Armstrong*, No. 97-686, Opp'n to Pet. for Cert. at 3.

Inaccessible facilities and transport vehicles pose grave risks for disabled prisoners who require accommodations to

⁴See, e.g., *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (reversing grant of summary judgment for defendants on deaf inmate's statutory claims alleging that prison officials' failure to provide him with qualified interpreters foreclosed his participation in programs for which he was otherwise qualified); *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (same); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1027-32 (S.D.N.Y. 1995); *Randolph v. Rogers*, 980 F. Supp. 1051 (E.D. Mo. 1997).

ensure their safe evacuation in the event of emergency. Although disabled prisoners run the risk of being trapped in the event of fire, prison staff do not receive special training on their safe evacuation. *Armstrong*, No. C-94-2307, Statement of Stipulated Facts at 7-8.

II. THE ADA UNAMBIGUOUSLY APPLIES TO STATE PRISONS

A. The Language of the Statute is Broadly Inclusive and Incorporates Specific Reference to State Prisoners

Congress enacted Title II of the ADA to prohibit public entities from discriminating against disabled people.⁵ That disabled prisoners were among those Congress had in mind when it enacted the ADA is evident from the explicit statutory findings that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C.A. § 12101(a)(3) (West 1995).⁶

⁵Title II provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132 (West 1995).

⁶Petitioners argue that "'institutionalization' has nothing to do with prisons." Pet'r Br. at 16. However, the legislative history relied upon by Petitioners demonstrates that disabled prisoners were indeed among the institutionalized groups about

Moreover, the plain language of the ADA applies the statute clearly and unambiguously to state prisons and jails as "public entities"⁷ that provide "services, programs, or activities." 42 U.S.C.A. § 12132. The phrase "program or activity" is defined in the Rehabilitation Act as "all of the operations of . . . a department, agency, . . . or other instrumentality of a State or of a local government." 29 U.S.C.A. § 794(b)(1)(A) (West Supp. 1997). This definition is incorporated into the ADA through 42 U.S.C.A. § 12201(a), which provides in its entirety:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards

whom Congress was concerned. In a 1983 report incorporated into the congressional record, the United States Commission on Civil Rights identified "major types or areas of discrimination" in the criminal justice system, including the "[d]isproportionate number of mentally retarded people in prisons and juvenile facilities;" "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities;" "[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities);" and "[a]buse of handicapped persons by other inmates." U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Sept. 1983, App. A at 168. See S. Rep. No. 101-116, at 8 (1989); H.R. Rep. No. 101-485, pt. 2 at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 312; Pet'r Br. at 17.

⁷State and local correctional agencies fall within the ADA's definition of "public entity" as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C.A. § 12131(1).

applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C.A. § 12201(a) (West 1995). In enacting the ADA, Congress thus incorporated the standards of coverage from the Rehabilitation Act, including the definitions of "program" and "activity."⁸

The ADA defines as "qualified" "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C.A. § 12131(2). Under this definition, essential program criteria need not be waived. Contrary to Petitioners' assertion, nothing in the statutory language indicates that voluntariness is an essential element of participation.⁹

⁸Title V of the Rehabilitation Act includes Section 504, which is codified at 29 U.S.C. § 794.

⁹This Court's frequent references to prisoner "participation" in "programs" and "services" reflects the plain meaning of those terms. See, e.g., *Block v. Rutherford*, 468 U.S. 576, 580 (1984) ("contact visitation program"); *Hudson v. Palmer*, 468 U.S. 517, 552 (1984) ("rehabilitative programs and services"); *Olim v. Wakinekona*, 461 U.S. 238, 246 (1983) ("appropriate correctional programs for all offenders"). Petitioners' use of these terms undercuts their argument that prisons do not provide "services, programs, and activities." See Pet'r Br. at 31-32; Br. of Amici States Attorneys General at 5; Br. of Amici Council of State Gov'ts at 11.

In addition to the broadly inclusive statutory language, DOJ promulgated regulations that specifically apply the Rehabilitation Act to state prisons and Congress expressly incorporated these regulations into the ADA pursuant to the language of 42 U.S.C.A. § 12201(a).¹⁰ Petitioners' obligation to obey those regulations, therefore, is not a matter of *Chevron* deference but Congressional command.

Of particular note, the ADA's statutory incorporation provision includes the preamble to the DOJ regulations implementing the Rehabilitation Act, which explicitly requires that "a sufficient number of detention cells need be accessible to wheelchair users" in detention and correctional facilities.¹¹

¹⁰This provision incorporates the regulations issued under 29 U.S.C.A. §§ 790 *et seq.*, from Sections 500 through 506 of the Rehabilitation Act, including the 1980 regulations, which were designed to "implement section 504." Congress also adopted in the ADA "any requirements of those regulations . . . such as program access that go beyond titles I and III." H.R. Rep. No. 101-485, pt. 2 at 84, *reprinted in* 1990 U.S.C.C.A.N. 303, 366-67. And the ADA further includes "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [of the Rehabilitation Act] . . . to any person alleging discrimination on the basis of disability in violation of section 12132." 42 U.S.C.A. § 12133 (West 1995).

¹¹45 Fed. Reg. 37,620, 37,630; 28 C.F.R. pt. 42(G), app. B, subpt. (c)(2) (1980). These regulations further require that: [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. . . . In making housing and program assignments, such

The regulations define "program" to include the operations of a department of corrections, and "benefit" to include disposition, sentencing and confinement.¹²

Congress, by incorporating these regulations into the ADA itself, expressly applied the statute to state prisons. When, as here, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

[correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmates.

45 Fed. Reg. at 37,630.

¹²45 Fed. Reg. 37,620, 37,627; 28 C.F.R. § 42.540(h), (j) (1980). In addition, regulations promulgated under Section 502 of Title V of the Rehabilitation Act, codified at 28 C.F.R. § 42.522(b) (1988), adopt the Uniform Federal Accessibility Standards [UFAS] accessibility guidelines. UFAS specifically mentions jails, prisons, and "other detention or correctional facilities." 41 C.F.R. pt. 101, subpt. 101-19.6, app. A at 4.1.4(9)(c) (1997). Agencies have the choice of following UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) in meeting their obligations under the ADA, and need not follow *either* set of guidelines, as long as they provide equivalent access. 28 C.F.R. § 35.151(c) (1997).

Because the language of the ADA is unambiguous, there is no occasion for this Court's application of the "clear statement rule" of statutory construction as set forth in *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). In *Gregory*, this Court found that the text of the Age Discrimination in Employment Act of 1967 (ADEA) was ambiguous with respect to coverage of state judges and, accordingly, held that it did not preempt a state constitutional provision mandating retirement of state judges at age 70.

Alternatively, the clear statement rule has been satisfied in this case because Congress has stated that the non-discrimination mandate of the ADA applies to all operations of state and local governments, has authorized the DOJ to promulgate regulations that specifically apply the statute to state prisons, and then has actually incorporated these regulations into the ADA.

B. Because Prison Management Does Not Go to "the Heart of Representative Government," the Regulations Applying the ADA to Prisons are Entitled to Substantial Deference

The Court in *Gregory* declined to resolve the statutory ambiguity in the ADEA in favor of coverage of state judges because to do so would preempt Missouri's state constitutional provision which "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. Here, by contrast, the statutory language is unambiguous and application of the ADA to prisons would not infringe upon a core function going to the "heart of representative government." See *Crawford*, 115 F.3d at 485 (Posner, C.J.) (holding that the "mere provision of public services, such as schools and prisons, is not within that inner core [of sovereign

functions.]")

Unlike *Gregory*, therefore, the regulations in this case explicitly applying the ADA to state prisons are entitled to substantial deference under *Chevron*. Congress directed the Attorney General to promulgate regulations implementing the ADA,¹³ and to "coordinate the compliance activities of Federal agencies with respect to State and local government[s]" that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions."¹⁴ The ADA's interpretive analysis¹⁵ also makes it explicit that the regulations apply to state prisoners. 28 C.F.R. pt. 35 app. A, § 35.102 at 478 (1997) (requiring "attendant care, or assistance in toileting, eating or dressing to individuals with disabilities" only in "special circumstances," such as in correctional institutions.)¹⁶

¹³42 U.S.C.A. § 12134(a).

¹⁴28 C.F.R. § 35.190(a), (b)(6).

¹⁵This Court accords the same deference to the DOJ interpretive analysis as to the regulations themselves. *Alexander v. Choate*, 469 U.S. at 305 & n.26 (1985).

¹⁶See also 36 C.F.R. § 1191.2 (1997) at 12.1 (applying the ADA to "jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons.") In addition, the DOJ Title II Technical Assistance Manual specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the statute, must be readily accessible to and usable by individuals with disabilities. U.S. Dep't of Justice, The Americans with Disabilities Act: Title

In *Chevron*, this Court held that administrative agency regulations are entitled to deference unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Absent that showing, which cannot be made here, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* Moreover, this Court has repeatedly applied the *Chevron* rule when interpreting the disability discrimination statutes, stressing that the regulations, because they were promulgated with the oversight of Congress, are an important source of guidance and merit substantial deference. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Alexander v. Choate*, 469 U.S. at 304 n.24; *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987).

The ADA regulations effectuate the broad remedial purpose of the statutes to eliminate discrimination, are entirely consistent with the plain meaning of the statutory language and impose no obligations on state prisons beyond those mandated by the statutes' broad nondiscrimination mandate.

For the courts to create by judicial fiat a "prison exception" to the ADA that is contrary to the unambiguous language of Congress would usurp the legislative function, and run counter to this Court's recent admonition that:

Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench

upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.

Salinas v. United States, 118 S. Ct. 469, 475 (1997) (internal quotation marks and citations omitted).

III. THE ADA INCORPORATES PRINCIPLES OF DEFERENCE TO STATE OFFICIALS

Public entities need not make accommodations that impose "undue financial and administrative burdens" or require "fundamental alteration in the [essential] nature of [the] program." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (citation omitted); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979); 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.150.

Individualized determinations are necessary to assess whether public entities have discriminated in violation of the statutes. See *Arline*, 480 U.S. at 287-88. This approach is highly fact-intensive and takes into account several factors including the program's requirements, the prospective participant's qualifications, and the impact of the accommodation. Such an inquiry is responsive to the security concerns of prison administrators, for "[a] person who poses a significant risk . . . to others . . . will not be otherwise qualified . . . if reasonable accommodation will not eliminate that risk." *Arline*, 480 U.S. at 288 n.16.¹⁷

¹⁷See also 28 C.F.R. pt. 35 app. A at 472 (program modifications are not required if participation results in a "significant risk of a direct threat to the health or safety of others"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) ("courts will not second-guess the public health and safety decisions of state legislatures acting within their

The statutory inquiry necessarily requires factfinding to determine whether disabled plaintiffs can be reasonably accommodated without undue burden on program administrators. See *Arline*, 480 U.S. at 288 (remanding to determine whether an elementary schoolteacher was "otherwise qualified" for the job in spite of her tuberculosis).¹⁸

traditional police powers. However, . . . it is incumbent upon the courts to insure that the mandate of federal law is achieved.") (internal citation omitted); *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983) (noting that program administrators are entitled to deference based on their experience and knowledge of the program at issue, but rejecting "broad judicial deference" as applied under rational basis scrutiny because it "would substantially undermine Congress' intent in enacting section 504"); *Doe v. New York University*, 666 F.2d 761, 776 (2d Cir. 1981).

Contrary to Petitioners' argument, the ADA does not forbid prison officials from taking appropriate steps such as placement in protective custody housing to ensure the safety of disabled prisoners. Pet'r Br. at 29.

¹⁸See also *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) (remanding for factfinding regarding state's animal quarantine law as applied to blind plaintiffs who relied on trained guide dogs; "determination of what constitutes a reasonable modification is highly fact-specific, requiring a case-by-case inquiry"); *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983) (requiring development of a factual record to determine if a hearing-impaired school bus driver was "otherwise qualified" for a license and if reasonable modifications affect the "essential nature" of the job or impose an undue burden); *Martin v. Voinovich*, 840 F. Supp. 1175, 1191 (S.D. Ohio 1993) (noting the prematurity at motion to

A. The Statute Requires *Reasonable* Modifications

The ADA regulations governing existing facilities do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a)(1), or "[r]equire a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3).¹⁹

Public entities are not required to make fundamental alterations in their programs:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7).

In making this assessment, the courts have largely

dismiss stage of assuming that if a § 504 violation were found, a court would order expansion or creation of new programs).

¹⁹This regulation was based upon the anti-discrimination provisions of the regulations implementing Section 504 and "therefore [is] already familiar to State and local entities covered by Section 504." 28 C.F.R. pt. 35 app. A at 474.

upheld state policies. See, e.g., *DeBord v. Board of Educ. of Ferguson-Florissant*, 126 F.3d 1102 (8th Cir. 1997) (finding that school district's refusal to give excessive doses of Ritalin beyond the recommended level to a child suffering from attention deficit disorder was not unreasonable), *reh'g en banc denied, and petition for cert. filed*, 66 U.S.L.W. 3532 (U.S. Feb. 6, 1998) (No. 97-1297); *Easley by Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994) (requiring the state to provide access to the attendant home care program regardless of patients' mental alertness through the use of surrogates would fundamentally alter the program).

But, where state agencies fail to demonstrate any fundamental alteration of their programs or any attempt to provide reasonable accommodations, they are not entitled to deference. See *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir.) (finding that state's refusal to allow physically disabled patients into attendant home care program was not justified where state failed to establish undue burden, and resulting nursing home placement was significantly more costly to the state), *reh'g en banc denied, and cert. denied*, 516 U.S. 813 (1995); *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 560-61 (7th Cir. 1996) (finding ADA violation where state presented no evidence showing its efforts to reasonably accommodate quadriplegic prisoner's participation in programs).

In applying the ADA's "reasonable modification" and "undue burden" standards, courts have thus made individualized determinations based upon facts that take into account the specific operational concerns of program administrators, including prison officials. There is no basis for exempting prisons from the statute's flexible approach.

B. The Statutory Liability of Prison Officials Should Not Be

Analyzed Differently from that of Other Government Officials

This Court need not define the appropriate standard of review governing ADA claims in the state prison context because that issue arises only after resolution of the issue presented, that is, application of the statute to state prisons. In the event that the Court reaches the standard of review, prison officials should be treated no differently from other state officials named as defendants under the statute.

In urging this Court to read into the ADA the standard from *Turner v. Safley*, 482 U.S. 78 (1987),²⁰ Petitioners abandon their reliance on the clear statement requirement. There is nothing in the language or history of the ADA suggesting that Congress intended to apply a different ADA standard in the prison context than in other contexts. The Eleventh Circuit recently declined to apply *Turner* to a Rehabilitation Act claim in the prison context without a congressional statement to that effect. *Onishea v. Hopper*, 126 F.3d 1323, 1336 (11th Cir. 1997), *vacated, reh'g en banc granted*, 133 F.3d 1377 (11th Cir. 1998). In so doing, the court in *Onishea* noted that the generally applicable statutory standards take into consideration the special setting of prisons.

²⁰In *Turner v. Safley*, this Court established a four-part test to determine whether regulations that impinge on prisoners' constitutional rights are reasonably related to a legitimate penological objective. While the *Turner* test is deferential to prison administrators, it is "not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). Among the factors analyzed under *Turner* is the impact on other prisoners, staff and resources of accommodating prisoners' rights, which is similar to the ADA standard calling for "reasonable modifications" that do not "fundamental[ly] alter" the program.

Id.

In short, the ADA's "reasonable modification" and "undue burden" standards are necessarily applied in light of the unique issues raised in the prison context. That is all that prison officials can ask. More importantly, it is all that Congress has required.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Marjorie Rifkin
Elizabeth Alexander
National Prison Project
of The American Civil Liberties Union Foundation
1875 Connecticut Avenue, N.W., #410
Washington, D.C. 20009
(202) 234-4830

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

David M. Porter
National Association
of Criminal Defense Lawyers
801 K. Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1997

**PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,
v.
RONALD R. YESKEY,
Respondent.**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

**BRIEF AMICI CURIAE OF
ADAPT, PENNSYLVANIA COALITION OF
CITIZENS WITH DISABILITIES and DISABLED IN
ACTION OF PENNSYLVANIA IN SUPPORT OF
RESPONDENT**

Stephen F. Gold*
125 S. 9th Street
Ste 700
Phila., Pa. 19107
(215) 627-7100

**Counsel for ADAPT,
PENNSYLVANIA COALITION OF CITIZENS WITH
DISABILITIES and DISABLED IN ACTION OF
PENNSYLVANIA
*Counsel of Record**

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AMICI CURIAE BRIEF OF
ADAPT, PENNSYLVANIA COALITION OF CITIZENS
WITH DISABILITIES and DISABLED IN ACTION OF
PENNSYLVANIA IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

Amici are three organizations, one national and two in Pennsylvania, composed primarily of persons with physical and mental disabilities, including persons with spina bifida, cerebral palsy, muscular dystrophy, spinal cord injuries, multiple sclerosis, quadriplegia, paraplegia, head and brain injuries, polio, amyotrophic lateral sclerosis, persons with sensory disabilities, including persons

who are blind or Deaf, and persons with cognitive and developmental disabilities. Many of these persons use assistive devices, including motorized and manual wheelchairs, white canes, ventilators, communication devices and personal assistance services for meeting their personal hygiene needs and transferring from bed to wheelchair.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* It was the plaintiff in the case ADAPT v. Skinner, U.S. Department of Transportation, 867 F.2d 1471, 881 F.2d 1184 (3d Cir. 1989) and filed an amici curiae brief in Vacco, et al. v. Quill, et al., 117 S.Ct 2293 (1997).¹

PENNSYLVANIA COALITION OF CITIZENS WITH DISABILITIES ("PCCD"), a statewide organization, is a consumer-controlled organization governed and staffed by individuals with

¹ All parties have consented in writing to filing of this brief. Copies of the written consents are on file with the Clerk of the Supreme Court.

diverse disabilities. PCCD's primary mission is to advocate for the civil rights of and governmental services for people with physical, sensory and mental disabilities, including prisoners in Pennsylvania who have disabilities.

DISABLED IN ACTION OF PENNSYLVANIA ("DIA") is an organization celebrating its twenty-fifth year of advocating for the civil rights of all persons with disabilities, including Pennsylvanians who are in nursing homes, prisons, and other institutions. DIA is comprised of people with physical and mental disabilities and has been the lead plaintiff in a number of lawsuits to increase accessibility to people with disabilities. See, e.g. DIA v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied, 108 S.Ct 1293 (1988), DIA v. Pierce, 606 F.Supp. 310 (E.D. Pa. 1985), aff'd 789 F.2d 1016 (3d Cir. 1985).

SUMMARY OF ARGUMENT AND INTRODUCTION

Persons with disabilities face a complex maze of discrimination in the free world. Prisoners with disabilities face even harsher forms of discrimination in closed institutions and, without the protections of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, they will have no redress for and protection from the pernicious effects of discriminatory policies and practices.

As we will show, inmates with disabilities are all too often excluded from regular prison programs and services and, in addition, are subjected to inexcusable indignities, intentional discrimination, harassment and abuse, because of their disabilities.

All prisoners are relatively powerless. Amici ask only that prisoners with disabilities not be made more powerless or prone to mistreatment because of their disabilities. The ADA was intended to prevent discrimination against disabled people regardless of their location in our society. Of course, the situs of the differential treatment is important with respect to the state's duty to afford reasonable accommodations, and the treatment of disabled persons in prison must take into account issues of security, cost, and relevant administrative burdens.

In this Amicus Brief, we make two fundamental points. First, there is at the present time substantial evidence of ongoing, systemic and at times life and health threatening discrimination against persons with disabilities in the nation's prisons and jails. The ADA was intended to apply to all institutions in which disabled persons found themselves subject to discrimination based on their disabilities.

Second, the ADA requires only *reasonable* accommodations and modifications of existing policies and practices, not changes that might cause undue administrative and financial burdens. Petitioner and other States attempt to persuade the Court that compliance with the ADA will cause grave havoc in the prisons, but there presently exist numerous examples of reasonable accommodations and modifications of prison policies and practices that comply with the ADA, demonstrating that prison accommodations can be readily implemented and discrimination against people with disabilities eliminated.

The states have not and will not face great difficulties in adhering to the relevant ADA's standards. Only where there is proven discrimination based on disabilities and only where a "reasonable accommodation" can be provided is the state required to redress the effects of the discrimination. Of course, where the discriminatory conduct is manifested in abuse or a failure to protect, there can be no penological justification and the ADA rightfully demands a cessation of such treatment. The history of the application of the ADA to prisons demonstrates that reasonable accommodations are often easily made and that the law does not undermine legitimate security or prison administrative concerns.

Adjustments to prison programs and policies have been made by prison administrators with no proof of adverse effects on prison management.

ARGUMENT

I. Prisoners with Disabilities, Because They are Disabled, Are Intentionally Discriminated Against, Sometimes Abused and Hated, and, Are Denied And Excluded From Prison Services, Programs And Activities Nondisabled Prisoners Routinely Receive From Departments of Corrections

The ADA is the federal *civil rights* statute for people with disabilities. Congress recognized that people with disabilities were discriminated against in institutions, including prisons, jails, mental hospitals and nursing homes. 42 U.S.C. § 12101(a)(3). To prevent and remedy such discrimination, Congress mandated that no person with a disability, "by reason of such disability," shall be: (a) "excluded from participation in ...", or (b) "denied the benefits of the services, programs or activities," or (c) "subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphases added).² Eliminating discrimination against people with disabilities in prisons requires that disabled inmates be treated equally with

² It is important to note that Congress recognized that being "subjected to discrimination" is a distinct prohibition, separate from being excluded from participation or denied the benefits of a public entities' services, programs or activities. Many of the examples in the text, *infra*, demonstrate how prisoners are subjected to the discrimination of abuse and hatred "by reason of [their] disability."

nondisabled prisoners: their disabilities not be an excuse for segregating them from nondisabled prisoners; they have the same opportunities as nondisabled prisoners to work, recreation, education, sanitation, dining, and health care; and their lives not be perceived or treated as less valuable than nondisabled prisoners.

This Court should hear how prisoners with disabilities are treated by virtue of their disabilities. By hearing their stories, one can better understand why Congress intended to end discrimination against people with disabilities in every institution.

● J. Scottie Harrelson is a paraplegic who was denied the use of his wheelchair and forced to crawl around the cell. Harrelson v. Elmore County, Ala., 859 F.Supp. 1465, 1466 (M.D. Ala. 1994).

● Cleo Love, a quadriplegic who uses a wheelchair, was excluded, because he was disabled, from the prison's group substance abuse program, transition program, commissary, outside recreation, a prison job, and access to education and its law library. "Documentary evidence supports the conclusion that the discrimination had to be intentional...." Mr. Love requested access to school... for six years.... [The prisons's ADA Coordinator wrote] that Mr. Love and others were 'excluded from some programs and

services simply because of where they are housed and based only on their limitations'." Love v. McBride, 896 F.Supp. 808, 809-10 (N.D. Ind. 1995)(emphasis added), aff'd sub nom. Love v. Westville Correctional Center, 103 F.3d 558, 559 (7th Cir. 1996)(Plaintiff was denied use of "the prison's recreational facilities, its dining hall, the visitation facilities that were open to the general population, and ...was unable to participate in substance abuse, education, church, work or transition programs available to members of the general inmate population.")

● **Pete Grassia**, a paraplegic (T-12), used a wheelchair for mobility. A guard taunted Grassia over the loudspeaker so that everyone up and down the cellblock could hear: "Hey Grassia! Did you [defecate] in your pants yet? Need a new diaper, cripple?" Jay Mathews, Under a New Law, A Rising Sensitivity to Disabled Inmates? The Washington Post, Nov. 24, 1993, at A4. "Grassia said, he has been denied catheters, access to showers when he loses rectal control and water needed to keep bedsores from becoming infected. He also said he was left on the floor for several hours when he fell trying to use the toilet....[D]isabled inmates insist they are mistreated precisely because they cannot move as fast as [nondisabled] prisoners." Id. Peter Grassia has difficulty obtaining leg bags and

catheters, which should be changed every day. Because he was denied catheters, he had to "tape them when they leak, wash out the bags and reuse them as well. Anyone familiar with sanitary cath[eter] procedures knows the serious danger of sepsis such a practice courts." Jean Stewart, Inside Abuse: Disability and Oppression Behind Bars, The Disability Rag & Resource, Nov.-Dec. 1994 at 6.

● **Grant H. Hendrick**, a nondisabled prisoner, was engaged to **Linda Gail Niece** who was Deaf. She could not communicate with Hendrick over the telephone without a Telecommunications Device for the Deaf (TDD), a device with a keyboard and screen that easily hooks up to a telephone, permitting persons to type and receive messages over the screen. Ms. Niece purchased a TDD to donate to the prison so she could communicate with Mr. Hendrick. The prison "flatly refused to accept the TDD or provide Plaintiff with access to a TDD...." Niece v. Fitzner, 922 F.Supp. 1208, 1212 (E.D. Mich. 1996).

● **Gloria Johnson** had multiple sclerosis, a degenerative neurological condition. As her MS progressed, she had no use of her legs or arms, was blind and used a wheelchair for mobility. In her file, officials wrote "Do not overly coddle - perhaps

deliberately 'delay' calls for bedpan to assess self-function.... 'The nurses wouldn't do anything for me,' she said. 'They wouldn't help me eat. From Sunday evening at 8 p.m. to Tuesday at 2:30 p.m. I didn't use the bathroom at all.... One night I had to go to the bathroom, so I fell out of bed and tried to drag myself to the bathroom. I didn't make it.'" Nina Siegal, Death Behind Bars, San Francisco Bay Guardian, Feb. 5, 1997, at 16.

● Larry Noland is a semi-quadruplegic as a result of a broken neck. He cannot use his legs, has limited use of his left hand, and can use his right hand. He has no bladder, and he uses a colostomy and urostomy bag to remove body waste. He requires soap and water to clean his hands when he cleans or changes the bags. Mr. Noland was put in a cell without a bed, no running water, only an open drain in the floor for disposal of bodily waste.

"Even after a physician prescribed more water to keep Mr. Noland's system functioning properly, the defendants denied him a sufficient quantity of water. [Defendant] refused to bring Mr. Noland water when he requested it. The physician prescribed sixty-four ounces of water for Mr. Noland per shift, but Mr. Noland often received less than eight ounces each day.

"Initially, Mr. Noland was not allowed to shower as other inmates were, but could only sponge bathe himself every other day.... His showering time was limited to thirty minutes despite his difficulties

washing himself with only one arm. Mr. Noland had to dress and undress on the shower floor....

"When Mr. Noland spilled or got materials from one of his bags on his hands, he often had to wait as long as twenty-four hours to wash it off. As a result, he had to eat many meals with the human waste still on his hands.

"[When] Mr. Noland was moved to a regular cell ..., [he] could not sleep in the bed provided because his wheelchair did not fit through the door to the bed....

"Mr. Noland's wheelchair once had a flat tire. When approached, [defendant] forced Mr. Noland to get out of the wheelchair and crawl back to his cell to have the tire repaired. On another occasion, [defendant] refused to allow Mr. Noland to wash his hands although Mr. Noland had feces on his hands, explaining that it was not Mr. Noland's bath day. Mr. Noland had to wait until his bath day to wash the feces off his hands.

"[D]efendants forced Mr. Noland to sit in his wheelchair for nearly thirteen hours despite having been advised that two hours was the prescribed limit that Mr. Noland could sit in his wheelchair. Although Mr. Noland asked to be moved several times, he was told to wait. Pressure on a paralyzed individual's skin for more than two hours is a common cause of pressure sores. As a result, Mr. Noland's new skin graft was destroyed and his pressure sore reopened."

Noland v. Wheatley, 835 F.Supp. 476, 480-81 (N.D. Ind. 1993).

● Winfried Rhodes is blind. "Because of his blindness, he is required to eat all of his meals in his cell and is prohibited access to the dining hall, gym, vocational shops, and

educational facilities.... He is frequently subjected to psychological abuse by guards who sneak up behind him to frighten him, place tape across the doorway of his cell, and move the furniture around in his cell." Jean Stewart, Life, Death, and Disability Behind Bars, New Mobility, June 1998 (forthcoming).

● Easton Beckford has paraplegia and uses a wheelchair for mobility. The prison's sinks have push-button faucets difficult to operate from a wheelchair. "Easton Beckford ... said in an affidavit that he has to collect water by using a makeshift stopper and then lifting it in his hands to his body, causing some to spill on the floor. Several times [Beckford] has been given a 'deprivation order' for spilling waters, which means 'they turn the cell water on for only 15 minutes each day,' he said. 'That is my only opportunity to drink water, brush my teeth, clean myself and flush the toilet'." Jay Mathews, Under A New Law, *supra*. In 1994, "[Beckford's] wheelchair was taken away from him for months on end, rendering him unable to move from his bed. Both sink and toilet in his cell were inaccessible; Easton frequently soiled himself. As punishment for his complaints about lack of access, he's been denied permission to take showers in the shower room." Jean Stewart, Life, Death and Disability Behind Bars, *supra*.

● A Houston District Court stated that the

"straitened circumstances under which these inmates live are contrary to reason and common sense. Physically handicapped inmates must either manage as best they can, with virtually no special assistance, in physical environments which pose extreme difficulties for them, or spend their days vegetating, denied access to virtually all the programs and activities available to non-disabled inmates.... In short, [the Department of Corrections] provides essentially no accommodations for handicapped inmates which would enable them more effectively to function and contend with their desperately onerous situations in prison."

Ruiz v. Estelle, 503 F.Supp. 1265, 1340 (S.D. Tex. 1980).³

● Patty Contreras, who was five feet tall and weighed 80 pounds, had AIDS and also had grand mal seizures. She "slump[ed] in her wheelchair, barely able to lift her head." She, like other women who are HIV-positive or had AIDS, was "segregated into special prison yards," had her HIV status disclosed to fellow prisoners, and was "denied certain prison privileges, such as jobs and

³ The Ruiz decision points out numerous examples of discrimination that existed before the enactment of the ADA. Ruiz, *supra* at 1341-1343. Unfortunately, the decisions since Congress enacted the ADA in 1990 demonstrate that such discrimination still exists. As Congress pointed out, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals continue to be a serious and pervasive social problem ...[and] individuals with disabilities are ... subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals...." 42 U.S.C. § 12101(a)(2) & (7).

spousal visits." Nina Siegal, Infected - and Ignored, San Francisco Bay Guardian, Feb. 19, 1997, at 19.

● **Jerome Crowder**, a paraplegic serving a life term, was denied the use of his wheelchair. Being confined to his bed for almost four months, as it did not fit through the cell door, he developed decubitus ulcers. Crowder v. True, 1993 WL 532455 (N.D. Ill. Dec. 21, 1993).

● **Doris Clarkson, Mark Brock, Terryton Harrison and Riis Powell** were Deaf either since early childhood or from birth. All communicate using only American Sign Language (ASL). **Janice Whan, Glennis Robertson and Larry Randall** were hearing-impaired and communicated using ASL, lip reading or hearing aids. Although there were more than 50 inmates in the State's prisons who were Deaf and hard of hearing, "DOCS' Program Services Manual explicitly excludes disabled inmates from 26 academic and vocational programs.... An example of such exclusions is class member **Robertson** who was removed from a drug counseling program ...when correctional staff realized that she could not follow the group's discussions. She was then repeatedly denied access to such a program ... because of her disability." Clarkson v. Coughlin, 898 F.Supp. 1019, 1047 (S.D.N.Y. 1995). As

a result, in part, of **Robertson's** removal from the drug counseling program, she was denied her application for temporary release. Id. at 1031. All of the plaintiffs required a telephone communication device (TDD), a closed-captioned decoder for spoken words on telephone, and visual alarm system for emergencies such as building fires. Prison officials were also aware of prisoners who, because they were Deaf or hearing impaired, were denied participation in DOCS program and activities. Id. at 1028. **Clarkson** received no educational program and could not communicate with the Parole Board staff. Id. at 1029. **Whan** could not hear the fire alarm and could not use the telephone. **Brock** was denied the few programs available to nondisabled inmates "because he is deaf:" he could not participate in an Alcoholics Anonymous program and he "missed morning count because he could not hear the public announcement system." Id. at 1030. **Harrison** was "denied all programming because of his deafness and stayed in his cell twenty-four hours a day. At no DOCS facility was he permitted to participate in a group drug and alcohol rehabilitation program because he had no access to an interpreter." Id. at 1030. **Powell**, despite the sentencing Judge's letter and a presentence report requesting interpreters, was unable to

communicate with other inmates... rendering him isolated, and 'left out.'" Id. at 1031.

● Prison officials removed the library from the 1st floor to the basement, making it inaccessible to inmates with disabilities. Robert M. Layne v. Supt. Mass. Corr. Inst. Cedar Junction, 406 Mass. 156, 546 N.E. 2nd 166 (1989).

● A prison system conducts mandatory HIV tests. HIV-positive inmates are segregated from other inmates and the DOC prohibits inmates who test positive from participating in most educational, vocational, rehabilitative, religious, and recreation programs offered in the state prisons. Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997).

● Richard Jackson is paralyzed from the waist down and uses a wheelchair. On Father's Day, he rolled to the visiting room to visit his father. The guard told him "he would have to be taken from his wheelchair for a strip and rectal search before his visit. Jackson, who wears a catheter because he can't control his bladder, refused because the guards had only a toilet seat on which to place him after removing him from the wheelchair. He asked to be taken to a nearby infirmary and searched under proper conditions. The visiting room guard wrote an 'incident report' against him for

disobeying an order, told his dad to leave, and rolled Richard to Isolation in his wheelchair." Dannie M. Martin and Peter Y. Sussman, Committing Journalism, 155-156 (1995).

● Jesus "Jesse" Montez is paralyzed on one side of his body and uses a wheelchair. Because of barriers to access in the prison, he has been "denied a job or access to other programs Mobility-impaired inmates have to rely on other inmates to carry them upstairs.... Jesse has lain on the floor in the shower several times because no one would pick him up."

"Montez was deprived of a wheelchair assistant because two prison employees decided, without any medical evaluation, that Montez should be more self-sufficient...."

"There are no jobs available for disabled inmates, so they can't work.... Then they're classified as idle inmates and so they lose privileges and are sent to facilities used for punitive segregation of inmates who don't work." Sue Lindsay, Paralyzed Inmate Sues State Prisons, Rocky Mountain News, Aug. 11, 1994 at 8A.

● William A. Wall was HIV-positive. Jail officials kept him "isolated in a one-man cell during his incarceration.... He said he was segregated from the remaining inmate populations because of his medical status and was therefore denied access to

programs, services, activities, and privileges ... includ[ing] religious programs, recreation, Alcoholics Anonymous meetings, watching television, library privileges, showers, a larger cell, interaction with other inmates in a cell block and regular removal of trash from his cell." Kim L. Hooper, HIV-Positive Man Agrees To Settlement, The Indianapolis News, Aug. 9, 1997 at W4.

● Timothy Purcell had Tourette's Syndrome. He had uncontrollable twitching, clicking and grunting. He has physical "tics" that "take the form of uncontrollable twitching, clicking and grunting. In some cases the verbal tics take the form of 'coprolalia,' in which [he] exhibits uncontrollable use of foul language." The Superintendent of the Pennsylvania DOC wrote, in response to the prison doctor's recommendation that Purcell be given permission to return to this cell whenever he needed to release his Tourette's tics in private, "'We are not going to allow you to hide behind your Tourette's Syndrome diagnosis.... You have got to learn that you are to follow lawful orders and not 'pick and choose' using Tourette's Syndrome to explain your inability to do what is expected.'" Purcell had "allegedly previously been ridiculed and assaulted by inmates and guards who did not understand his condition." Shannon P. Duffy, ADA Applies to Prisoners, The Legal Intelligencer, Jan. 13,

1998, at 3. See Purcell v. Pennsylvania Dept. of Correction, 1998 U.S. Dist. LEXIS 105 (E. D. Pa. Jan. 9, 1998).⁴

● Carmen Jean Harris, Leslie John Pettway and James Hollifield were HIV-positive. The "DOC's policy ... uniformly segregat[ed] from the general prison population those prisoners who test positive" for HIV and are "assigned to one of two segregated HIV wards established by the DOC." Harris v. Thigpen, 941 F.2d 1495, 1498, 1500 (11th Cir. 1991). In addition, DOC had a "blanket exclusion of HIV-positive inmates from general prison population housing, educational, employment, community placement and other programs...." Id. at 1501. They were "categorically separated from virtually all aspects of general population institutional life, e.g., housing assignments, education, employment, recreation, dining, law library use, religious services, family visitation, transportation, sick call and canteen. As a result, they have not been able to participate in most of the programs available

⁴ Amici do not understand how Petitioner believes that Timothy Purcell's case could have "possible fiscal ramifications, and serious operational implications, of applying the ADA to prisoners." Brief of Petitioner at 15, n. 5. All the prison officials have to do is permit Mr. Purcell to return to his cell when he had "tics."

to general population prisoners, while in other cases, the segregated programming provided to them is not comparable." *Id.* at 1521-22.⁵

II. Reasonable Accommodations and Modifications of Prison Programs Exist For Persons With Disabilities In Compliance With the ADA, Demonstrating that With Minimal Effort Prisons Can Comply with the ADA and Not Discriminate Against Persons Because They Are Disabled

Reading Petitioner's and the States' amici curiae brief, one would think that disabled prisoners recently fell from another planet into state prisons and that no one has been able to effectively and reasonably accommodate prisoners who have disabilities. Nothing could be further from the truth.

Some wardens have had no difficulty making reasonable accommodations and modifications of programs. For example, at a Ohio Department of Rehabilitation and Correction facility for adult women, the warden wrote that "most accommodations necessary are

⁵ Petitioner fails to discuss the harsh realities of discrimination against prisoners with disabilities. Rather, their focus is on the alleged interference caused by the ADA on security and administrative concerns of prisons. If the ADA is not enforceable in the prison setting, systemic discrimination will continue to injure persons solely because of their disabilities. There are no other realistic remedies for the types of discrimination that disabled prisoners face. Constitutional claims under the Eighth and Fourteenth Amendment present often insurmountable burdens of proof regarding intent and malice, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986), the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626, places substantial limitations on the power of federal courts to remedy constitutional violations, and immunities preclude relief in a wide variety of contexts. Without the ADA's statutory protection, disabled prisons will be consigned to the kind of discriminatory treatment described above.

very easy and inexpensive to achieve.... Wheelchair ramps are required by law and are more easily achievable in the prison system than anywhere else because of the available labor to build them.... [M]ost accommodations are quite inexpensive." Barbara Brown Nichols, *Sensitizing Staff*, *The Disability Rag & Resource*, Nov.-Dec. 1994 at 21.⁶

A number of ADA complaints have been filed by prisoners with the United States Department of Justice's Disability Rights Section ("DOJ") that have resulted in settlements. Each settlement demonstrates that the ADA's requirements for reasonable accommodations and modifications of policies and programs are very doable in the prison context and do not present an undue administrative or financial burden. For example, a young man who is Deaf was denied a sign language interpreter or other means of effective communication during counseling sessions and was denied an interpreter for a disciplinary hearing. His mother, who has a mobility impairment, could not see her son, other than going down

⁶ This same warden wrote that "[j]ust ten years ago I saw a Deaf inmate wearing a sign saying "DEAF MUTE." He was forced to wear the sign to avoid being disciplined for not responding to and obeying the correctional officers. Now prisons in Ohio provide Deaf inmates with closed captioned televisions, TDDs and licensed interpreters.... The biggest and best step was the simplest: learning to ask what accommodations are needed, then providing all reasonable requests. Barbara Brown Nichols, *supra* at 23.

two flights of stairs. She was denied access to an elevator located in the inmates' area. Prison officials entered a Settlement Agreement with DOJ agreeing to provide qualified interpreters and

"to afford ...an inmate an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity conducted by the Prison...[including] disciplinary hearings, individual and group counseling sessions, classes, and medical appointments... The Prison will give primary consideration to the requests of the inmates ... in determining what type of auxiliary aid or service is necessary..., [and] the Prison shall insure that the elevator leading to the visiting area is made readily available for the use of visitors with mobility impairments at all times that visitors are permitted in the facility."

Settlement Agreement Between the United States of America and the Prison of Chester County, Pa., Dept. of Justice Complaint Number 204-62-70 (Sept. 12, 1996).

Another example of a reasonable accommodation also involved a Deaf man who filed a complaint alleging the prison refused to provide him with a telecommunications device for the Deaf (TDD) that he requested to make outgoing telephone calls. Prison officials entered a Settlement Agreement with DOJ, agreeing to purchase and "to make the TDD's available to inmates and visitors in such manner as to make telephone communication as readily available to individuals with hearing impairments as such

communication is available to others without hearing impairments." Settlement Agreement Between the United States of America and the Lackawanna County Sheriff's Department, Lackawanna County, Pa., Dept. of Justice Complaint Number 204-62-47 (Jan. 25, 1996).

In another DOJ Settlement Agreement, to correct inaccessibility for persons with mobility impairments, the prison hired an architect who identified barriers to access that the prison agreed would be removed over the next few years. These barriers included adjusting door closets, providing telephones with volume control, replacing hardware on sanitary napkin dispensers, providing new 36" wide doors and frames, and modifying toilet stalls to accommodate a wheelchair. Settlement Agreement Between the United States of America and Autogamy County, Wisc., Dept. of Justice Complaint No. 204-85-40 (July 3, 1997).

In yet another DOJ Settlement Agreement, a prison agreed to house disabled inmates in a "regular inmate housing area, not [segregate them in] areas designated for inmates with 'special needs,' if regular housing is otherwise appropriate and requires no more than reasonable modification to housing conditions." Settlement Agreement Between the United States of America and the Wood

County Sheriff's Department, Bowling Green, Ohio, Dept. of Justice Complaint No. 204-57-100 (June 5, 1997).

The American Correctional Association has recognized that people with disabilities are part of the prison population and can be reasonably accommodated without undue administrative and financial burdens on prison officials. "The good news is that more often than not, ingenuity, imagination and professionalism will go further toward solving the problem [of prisoners with disabilities] than money.... After all, the problem is not a new one; all that's new is the amount of attention it is receiving." Herbert A. Rosefield, Issues to Consider in Meeting Handicapped Offenders' Needs, Corrections Today, Oct. 1992 at 110.

With regards to custody and security problems, the common sense suggestion was made that prison "[o]fficers should be taught how to properly strip search a wheelchair-bound paraplegic, disassemble wheelchairs and prostheses, and otherwise conduct a proper shakedown.... Questions will arise concerning requirements for leg cuffs on paraplegics, waist chains across colostomy bags and even handcuffs for those on crutches. Custody should consult medical personnel when making these decisions." *Id.* at 111. Regarding programs, it was pointed out that "[w]hile finding

appropriate jobs may be difficult, handicapped inmates frequently prove to be excellent workers. All too often no attempt has been made to put these inmates to work, and they have been forced to sit back and watch other inmates earn incentive wages and days off their sentences without an opportunity to do likewise. Education and recreation also must be tailored for disabled inmates' needs and interests. This may mean anything from installing a ramp in the education building to organizing a one-on-one wheelchair basketball contest." *Id.* at 112.

Since Robert Yeskey, the Respondent in the instant case, Yeskey v. Commonwealth of Pennsylvania Department of Corrections, 118 F.3d 168 (3d Cir. 1997), was denied access to Pennsylvania's boot camp, based on an apparent blanket exclusion, it is interesting to hear how other authorities have made reasonable accommodations and modifications to their boot camps.

"Some correctional administrators are examining their boot camp programs and modifying their 'hard labor' provisions to incorporate activities that are within the physical or mental capabilities of inmates who have a disability. Inmates who have a physical impairment could be required to do comparable work involving mental tasks, such as recording readings of books for the visually impaired, typing materials in braille, helping to maintain and beautify grounds, and folding newsletters or stuffing envelopes (without addresses) for the agency... South Carolina has a modified community work

release program for older offenders and those with disabilities.... Participants... must meet all eligibility requirements of the regular work release program with the exception of health status. They must be able to work, but they do not have to be considered 'able bodied'."

Joann B. Morton and Judy C. Anderson, Implementing the Americans with Disabilities Act for Inmates, Corrections Today, Oct. 1996 at 88. None of these accommodations are undue administrative or financial burdens.

A DOJ's National Institute of Justice publication correctly noted that the ADA did not require any public entity to institute accommodations or to modify its policies or programs if the changes would amount to either a fundamental alteration or an undue financial and administrative burden. "Fundamental alteration of a program may occur when the modification is such that it changes the very nature of the program so that the facility would, in effect, be offering a different kind of program. For example, if a prison offers courses for college credit that require certain prerequisite courses not offered on the premises, the facility would not be required to offer them to inmates with disabilities who had not taken these prerequisite courses. To require the facility to offer such prerequisites would, in effect, require it to offer a completely different course." Paula N. Rubin and Susan W. McCampbell, The Americans With Disabilities

Act and Criminal Justice: Providing Inmate Services, Research in Action, July 1994 at 2.

Despite Petitioner's and State amici's attempts to portray reasonable accommodation in prisons as sui generis, the same criteria used to analyze whether an accommodation is reasonable in schools, welfare offices, housing programs, streets, or in the public entity's other programs, also apply to prisons. For example,

"[a]chieving program accessibility [in prisons] may mean relocating services and activities from an inaccessible site to one that is accessible, redesigning equipment, providing auxiliary aids for disabled beneficiaries of city correctional programs, and altering an existing structure....The type of auxiliary aid or service necessary to ensure effective communication will vary depending on the length and complexity of the communication involved. In routine matters, for example, the exchange of written notes with a deaf prisoner may be sufficient. However, where communication is more complex, extensive, or significant - for example, during classes, counseling sessions, or disciplinary proceedings - a qualified sign language interpreter may be required." *Id.* at 3.

Even those issues unique to prison can be easily dealt with.

For example, classifications decisions in prisons

"should be based solely upon risk factors shown to be relevant to the particular facility where the inmate is incarcerated [and not on a statewide or even necessarily prison-wide basis]. Some factors that might be considered include current criminal charges(s), past criminal charges, incidents of escape or attempted escape, and past institutional

behavior.... While it may be appropriate to place inmates using wheelchairs in first floor locations so they can be evacuated safely in the event of fire, these locations should be scattered among the various first floor housing units to the extent possible. If an inmate's disability is a factor in making a housing decision, this decision should be handled during the override phase of the classification process because inmates with disabilities are not routinely housed separately; rather, they are considered on a case-by-case basis. In other words, the same classification process should apply to inmates with disabilities and inmates without disability.... Valid reasons for segregating inmates with disabilities include the determination that a particular inmate poses a direct threat to the safety of others or has requested to be segregated. It is important that the justification for an override be based on objective information, not mere speculation." *Id.* at 4-6.

It is ironic that the Petitioner objects to the instant Third Circuit decision in Yeskey, because the Pennsylvania Department of Corrections entered into a comprehensive settlement under the Rehabilitation Act of 1973, 29 U.S.C. § 794, the ADA's predecessor, where the parties agreed to

"eliminate or, at least, minimize unlawful discrimination against HIV-infected individuals... The DOC has agreed that, as a general rule, HIV-infected individuals will be precluded from a work assignment only if the individual poses a direct medical threat to the health of others. Although negative reactions of DOC employees or other inmates generally will not be a sufficient ground to justify restrictions on the employment of HIV-positive individuals, on occasion, the DOC may

reassign or transfer an HIV-positive individual for security reasons."

Austin v. Pennsylvania Dept. of Corrections, 876 F.Supp. 1437, 1453 (E.D.Pa. 1995). Such reasonable modifications of policies demonstrate the ADA's flexibility.

Common sense is a large part of all reasonable accommodations. As the Los Angeles Times Editorial stated in response to a federal judge's ruling:

"The ruling ... will equalize conditions for disabled prisoners, ensuring that they will be subject to conditions no worse than those for all other prisoners.

"Surely there are solutions - assuming both sides want them and not to just score ideological points - that would allow disabled inmates to have the same rights as other inmates without costing needless taxpayer dollars.

"One example might be clustering inmates with a particular disability at a prison with appropriate facilities. Some accommodations such as making strobe light alarms available for the inmates, could be relatively easy to put in place. But many problems can be foreseen: As the prison population ages, more and more disabilities can be expected.

"This is an issue that will not go away. Disabled prisoners should be treated no better, but no worse, than other prisoners." Obey Law, and Common Sense, The Los Angeles Times Editorials, Sept. 24, 1996 at B6.

CONCLUSION

The ADA is the federal civil rights statute intended to end discrimination against all disabled persons, regardless of the institutions in which they are placed or reside. If this Court were to hold the ADA does not to apply in prisons, people with disabilities would be the only minority whose civil rights - unlike civil rights based on race, sex or religion - are "park[ed] at the prison gates." Crawford v. Indiana Dept. of Correction, 115 F.3d 481, 486 (7th Cir. 1997)(Posner, CJ.). Disabled prisoners will continue to be discriminated against and devalued because they are disabled. Your amici seek accommodations which will allow disabled prisoners to function equally to nondisabled prisoners.

Respectfully submitted,

Stephen F. Gold*
125 S. 9th Street, Ste 700
Philadelphia, Pa. 19107
(215) 627-7100

Attorney for Amici Curiae
*Counsel of Record

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